FILE COPY

Supreme Court of the United States

No. 920

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TABLE OF CONTENTS

	PAGE
Reports of Opinions Below	1
Grounds for Invoking Jurisdiction	2
Questions Presented	4
Statutes Involved	6
Statement of Facts	6
Argument on Writ	14
Point I—The general verdict rendered by the jury in favor of the plaintiff was conclusive as to every issue of negligence submitted and it was the burden of the defendant to establish lack of privity and knowledge as to each issue submitted and the defendant failed to satisfy its burden of proof	14
Point II—The trial court erred in refusing to submit the issue of unseaworthiness to the jury	18
Point III—The trial court erred in limiting plaintiff's recovery to the value of Tug 26 and the barge Jones Point and in refusing to include other vessels involved in defendant's enterprise in New York Harbor and freight pending thereon	20
Point IV—The defendant did not seek to obtain the remedy of the partial defense of limitation of liability within the time allowed to pursue this special admiralty procedure	30
Point V—The court erred in failing to submit the issues of knowledge and privity to the jury along with the negligence issues	35

PAGE

Point VI—The limitation of liability statute as interpreted below is arbitrary, harsh, and fails to provide equal protection of the laws and deprives plaintiff of property without due process of law 38

CONCLUSION 45

APPENDIX:

Opinion 1a

Statutes Involved 7a

Cases Cited

Allen N. Spooner & Sons, Inc., In re, 253 F. 2d 584... 3, 34

Bartholomew v. Universe Tankships, Inc., 263 F. 2d 437 (2 Cir., 1959), cert. den., 359 U. S. 1000, 79 S. Ct. 1138, 3 L. Ed. 2d 1030 (1959) 37

Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954); sup. opin., 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) 45

Brown v. Hicks, 8 Fed. R. 155 (D. C. Mass., 1881).... 41

Cantwell v. Meade, 120 F. Supp. 406 (E. D. N. Y., 1954) 3, 33

Connolly v. Farrell Lines, Inc., 268 F. 2d 653 (1 Cir., 1959), cert. den., 361 U. S. 902, 80 S. Ct. 208, 4 L. Ed. 2d 158 (1959) 3, 31, 32

Cox v. Roth, 348 U. S. 207, 75 S. Ct. 242, 99 L. Ed. 260 (1955) 41, 42

Deep Sea Tankers v. The Long Branch, 258 F. 2d 757 (2 Cir., 1958), cert. den., 358 U. S. 933, 79 S. Ct. 316, 3 L. Ed. 2d 305 (1959) 21, 30, 34

Delany v. Moraitis, 136 F. 2d 129 (4 Cir., 1943)..... 41a

PAGE

Dexter-Carpenter Coal Co. v. New York, O. & W. Ry. Co., 50 F. 2d 270 (S. D. N. Y., 1931) 4, 20

Donnelly's Petition, In re, 138 F. Supp. 823 (N. D. Ohio, 1954); aff'd, 230 F. 2d 168 (6 Cir., 1956) 3, 34

Gardner v. The L. N. Danzler, 177 F. Supp. 736 (E. D. Va., 1959) 28

Garrett v. Moore-McCormack Co., 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942) 3, 16, 31

Great Atlantic & Pacific Tea Co. v. Brasiliero, 159 F. 2d 661 (2 Cir., 1947), cert. den., 331 U. S. 836, 67 S. Ct. 1519, 91 L. Ed. 1849 (1947) 15

Great Lakes Dredge Dock v. Lynch 173 F. 2d 281 (6 Cir., 1949) 17, 31

Green, Ex parte, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212 (1932) 31, 35

Husf v. Moore-McCormack Lines, 328 U. S. 707, 66 S. Ct. 1218, 90 L. Ed. 1534 (1946) 16

Jacob v. City of New York, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1952) 4, 16

Jacobus v. The Triboro No. 22, 267 F. 2d 547 (2 Cir., 1959) 20

Kernan v. American Dredging Company, 355 U. S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958) 42

Lamisert, 24 N. A. C. C. A. Law Journal (Nov. 1959):

Langes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520 (1931) 31, 32, 34

Markham v. Cabell, 326 U. S. 404, 66 S. Ct. 193, 90 L. Ed. 165 (1945) 41

Maryland Cas. Co. v. Cushining, 347 U. S. 409, 74 S. Ct. 608, 98 L. Ed. 806 (1954) 39

PAGE

McAllister Lighterage Line v. Insurance Co., 244 F. 2d 867 (2 Cir., 1957) 19

Morey v. Doud, 254 U. S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957) 45

Murray v. New York Central Railroad Company, 171 F. Supp. 80 (S. D. N. Y., 1959) 1

Navegacion Castro Riva v. The M.S. Nordholm, 178 F. Supp. 736 (E. D. La., 1959) 4, 19

Pate v. Standard Dredging Corp., 193 F. 2d 498 (5 Cir., 1952) 3, 32

Pershing Auto Rentals, Inc. v. Gaffney, 279 F. 2d 546 (5 Cir., 1960) 31

P. Sanford Ross, In re, 204 F. Rep. 248 (2 Cir., 1913) 15

Reading's Petition, In re, 169 F. Supp. 411 (N. D. N. Y., 1960) 39

Red Star Barge Line, Petition of, 160 F. 2d 436 (2 Cir., 1947) 17, 31

Sacramento Nav. Co. v. Salz, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663 (1927) 2, 20-22, 24

Sanford Ross, In re, 204 F. 2d 248 (2 Cir., 1913) 2

Schooner Eliza B. Emory, In the Matter of the, 3 Fed. R. 241 (D. C. N. J., 1880) 41

Schultz v. Pennsylvania Railroad Company, 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668 (1956) 16

Shipowners' & Merchants' Tugboat Co. v. Hammond Lumber Co., 218 F. 161 (9 Cir., 1914) 20

Smith v. Cahoon, 283 U. S. 553, 51 S. Ct. 582, 75 L. Ed. 461 (1931) 45

Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265 (1939) 15, 16

PAGE

Standard Dredging Co. v. Kristiansen, 67 F. 2d 548 (2 Cir., 1933) 22

Star Brick Corporation v. Johnson, 262 F. 2d 251 (2 Cir., 1959) 17

States Steamship Company v. United States, 259 F. 2d 458 (9 Cir., 1958), cert. den., 358 U. S. 933, 79 S. Ct. 316, 3 L. Ed. 2d 305 (1959), rehearing den., 359 U. S. 921, 79 S. Ct. 579, 3 L. Ed. 2d 583 (1959) 15

The Alvah H. Boushell, 38 F. 2d 980 (4 Cir., 1930) .. 20

The Bordentown, 40 F. 682 (D. C. N. Y., 1889) 20

The Capt. Jack, 169 F. 455 (D. C. Conn., 1909) 20

The Chickie, 141 F. 2d 80 (3 Cir., 1944) 30, 33, 34

The Columbia, 73 F. 226 (9 Cir., 1896) 20

The E. Madison Hall, 140 F. 2d 589 (4 Cir., 1944) 15

The Grasselli Chemical No. 4, 20 F. Supp. 394 (S. D. N. Y., 1937) 3, 34

The Irving, 33 F. Supp. 59 (S. D. N. Y., 1940) 3, 34

The Maine, 28 F. Supp. 578 (D. C. Md., 1938), aff'd, 107 F. 2d 373 (4 Cir., 1939) 3, 34

The New York Marine No. 10, 109 F. 2d 564 (2 Cir., 1940) 15

The No. 5 Motor Lifeboat, 57 F. Supp. 624 (S. D. N. Y., 1944) 20

The San Simeon, 63 F. 2d 798 (2 Cir., 1933) 28

The S & H No. 1, 37 F. Supp. 120 (E. D. N. Y., 1940) 3, 33, 34

The Steamtug S & H No. 7 Inc., 32 F. Supp. 282 (E. D. N. Y., 1940) 31

PAGE

The Teddy, 226 F. Rep. 498 (D. C. N. Y., 1915) 15

The William J. Riddle, 111 F. Supp. 657 (S. D. N. Y., 1953) 28

Trawler Gudrum, Inc., In re, 101 F. Supp. 586 (D. C. Mass., 1951) 17

Troupe v. Chicago, Duluth & Georgian Bay Transit Company, 234 F. 2d 253 (2 Cir., 1956) 4, 20

United States Dredging Corporation, In re, 264 F. 2d 339 (2 Cir., 1959), cert. den., 360 U. S. 932, 79 S. Ct. 1452, 3 L. Ed. 1545 (1959) 2, 22, 23, 25, 39

Verbeeck v. Black Diamond Steamship Corp., 269 F. 2d 68 (2 Cir., 1959) 15

W. E. Hedger Co., In re, 59 F. 2d 982 (2 Cir., 1932) .. 28

Whitcomb v. Emerson, 50 F. Rep. 128 (D. C. Mass., 1892) 27

Statutes Cited.

Federal Employer's Liability Act 42

Jones Act 2, 4, 6, 12, 16, 18, 36, 38, 42, 45, 46

Limited Liability Act (1851) 42

Limitation Statute 4, 5, 39, 43, 47

Merchant Marine Act 42

45 U. S. C.:

Sec. 51 et seq. 42

28 U. S. C. A.:

Sec. 1254(1) 4

Sec. 2101 4

PAGE

46 U. S. C. A.:

Sec. 183 et seq. 2, 6, 21

Sec. 185 (1936 amendment) 3, 13, 30, 32-35, 46

Sec. 688 ..... 6, 36, 42

Rule Cited

U. S. Supreme Court Rules of Practice in Admiralty and Maritime Cases:

Rule 51 33

Texts Cited

Gilmore & Black, "The Law of Admiralty" (1957):

Sec. 1-5 41

Sec. 10-3 39

Sec. 10-4, p. 666 ..... 39, 43

p. 667 40

1 Larson, "Workmen's Compensation Law" (1952):

Sec. 5.20 42

Robinson, "Admiralty" (1939):

Sec. 117, pp. 878-879 39

Miscellaneous

Lambert, 24 N. A. C. C. A. Law Journal (Nov., 1959):

Page 224 39

Page 225 ..... 39, 40

Page 226 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

CHRISTOPHER MURRAY,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 20, 1960.

Reports of Opinions Below

The first opinion of the trial court appears in *Murray* v. *New York Central Railroad Company*, 171 F. Supp. 80 (S.D. N.Y. 1959) and the second opinion of the trial court and the opinion of the United States Court of Appeals are not reported yet (122a; Pet. 1a).

Grounds for Invoking Jurisdiction

This court should grant a writ of *certiorari* because the Court of Appeals has departed from the usual course of judicial proceedings and has sanctioned such departure by the lower court and has decided important questions of federal law which have not been but should be decided by this court:

a. It held that where two grounds of negligence in a Jones Act case were submitted to a jury and a jury rendered a general verdict favorable to plaintiff thereon, and one of the grounds submitted undisputedly involved knowledge and privity of the defendant, the trial court subsequently could make independent findings as to negligence with reference to the defense of limitation and find a lack of privity and knowledge as to the ground of negligence selected by the trial court as controlling. This holding is in conflict with *In re Sanford Ross*, 204 F. 2d 248, 250 (2 Cir. 1913).

b. The court refused to apply the "economic enterprise" or "economic unit" theory in determining the group of defendant's craft which constituted "such vessel" within the meaning of 46 U.S.C.A. §183 where the plaintiff was a crew member on a master roster of the defendant who conducted centralized operations in New York harbor and used men, tugs and barges interchangably in its business operations. Cf. *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663 (1927); *In re United States Dredging Corporation*, 264 F. 2d 339 (2 Cir. 1959) cert. den. 359 U. S. 932, 79 S. Ct. 1452, 3 L. Ed. 1545 (1959).

c. It held that even though the partial defense of limitation of liability was raised by way of defense in an answer filed in a civil action after six months had expired from the date of claim, the District Court could not only transfer this defense for hearing to the

Admiralty side of the court without the filing of a petition, but could dispense with the six month provision limiting the time within which such defense could have been raised as well. 46 U.S.C.A. §185 Cf. *In re Allen N. Spooner & Sons, Inc.*, 253 F. 2d 584, *In re Donnelly's Petition*, 138 F. Supp. 823 (N.D. Ohio 1954); aff'd 230 F. 2d 168 (6 Cir. 1956); *The Maine*, 28 F. Supp. 578 (D.C. Md. 1938) aff'd. 107 F. 2d 373 (4 Cir. 1939); *Cantwell* v. *Meade*, 120 F. Supp. 406 (E.D. N. Y. 1954); *The S & H No. 1*, 37 F. Supp. 120 (E.D. N. Y. 1940); *The Irving*, 33 F. Supp. 59 (S.D. N. Y. 1940); *The Grasselli Chemical No. 4*, 20 F. Supp. 394 (S.D. N. Y. 1937).

d. The court below held that the plaintiff by including a count for maintenance and cure had invoked the admiralty jurisdiction of the court even though diversity of jurisdiction was present and was pleaded by plaintiff. This was in conflict with applicable federal court precedents. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942). *Connolly* v. *Farrell Lines, Inc.*, 268 F. 2d 653 (1 Cir. 1959) cert. den. 361 U. S. 902, 80 S. Ct. 208, 4 L. Ed. 2d 158 (1959); *Pate* v. *Standard Dredging Corp.*, 193 F. 2d 498 (5 Cir. 1952). The erroneous statement of law was used by the Court of Appeals as a ground for stating that the plaintiff had invoked the jurisdiction of the admiralty court thereby making it unnecessary for the defendant to file a petition to invoke admiralty jurisdiction as to the limitation issues which can be determined only by an admiralty court.

e. The court below did not discuss the alternative contention of the plaintiff that if the established rule requiring the defendant to file a petition in admiralty in order to invoke the exclusive jurisdiction of admiralty in limitation proceedings is to be altered to permit the defense to be raised merely by an answer in a civil

action then the court should at least submit the limitation issues of privity and knowledge which are related to negligence issues for factual determination by a jury along with the negligence issues.

f. The limitation statute as applied by the courts below is arbitrary, harsh, discriminatory and deprives the plaintiff of property without due process of law and the equal protection of the laws.

g. There was evidence that the 43 year old tug used which was subsequently valued at less than 6% of its replacement value by defendant's expert was awkward, hard to handle, difficult to shift, underpowered and lacked "pep". The court held as a matter of law that this evidence was not sufficient to submit the issue of unseaworthiness to the jury. Since defendant knew of the characteristics of the tug which it used as an "extra boat", a finding in favor of plaintiff on this issue would have precluded limitation. This was error in the light of the applicable federal court precedents. Cf. *Jacob* v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1952); *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Company*, 234 F. 2d 253 (2 Cir. 1956); *Navegacion Castro Riva* v. *The M.S. Nordholm*, 178 F. Supp. 736, 739 (E.D. La. 1959); *Dexter-Carpenter Coal Co.* v. *New York, O. & W. Ry. Co.*, 50 F. 2d 270 (S.D. N. Y. 1931).

The opinion and judgment of the United States Court of Appeals was filed February 20, 1961. Jurisdiction for the issuance of a writ of *certiorari* by this court is granted by 28 U.S.C.A. §1254 (1) and §2101.

Questions Presented

1. Where a jury renders a general verdict in favor of a plaintiff on a Jones Act cause of action may a court acting on a motion on a partial defense of limitation of

liability in that civil action make its own findings of fact concerning negligence and proximate cause and its own findings as to knowledge and privity with relation thereto?

2. May the federal district court in an action where it is sitting on its civil side and where diversity of citizenship jurisdiction exists give the special remedy of limitation of liability where the defense has merely been raised in an answer filed in the civil action over six months after claim was made and no petition in admiralty had been filed even though this defense is contested?

3. Whether or not, where the special statutory defense of limitation of liability is raised in a civil action and the jurisdiction of the admiralty court is not invoked, the factual issues relating to privity and knowledge should be submitted to the jury along with the negligence issues to which they relate?

4. Whether or not, where there was evidence that a tug was underpowered, awkward, and not adequate for safe use in maneuvering barges, a jury question presented relating to unseaworthiness?

5. Whether or not the interpretation of the Limitation Statute restricting recovery to the value of a fraction of the centralized fleet of tugs and barges operated by the defendant in its railroad operations in New York Harbor and served by crews made up from seamen on defendant's master roster was proper?

6. Whether or not the defendant was obligated by the limitation statute to offer "freight pending" where a tug is used to move the defendant's own barges from place to place in New York Harbor?

7. Whether or not the interpretation of the Limitation Statute which produced harsh and absurd results without serving any reasonable objective of policy was ar-

bitrary, discriminatory, and capricious and violated the due process and equal protection provisions of the United States Constitution?

Statutes Involved

(See Appendix Printed at Pages Pet. 7a to Pet. 9a.)

Statement of Facts

This is a petition for *certiorari* by plaintiff from a judgment of affirmance by the Court of Appeals for the Second Circuit. The jury had awarded the plaintiff $75,000.00 in damages under the Jones Act for negligence of the defendant (113a). The trial court fixed maintenance and cure at $2,800.00 and granted defendant's motion on its defense of limitation of liability (119a). The valuation of the vessels involved was fixed at $16,000.00 (163a). This was affirmed on appeal.

The plaintiff sued in the United States District Court, civil side, for personal injuries under the Jones Act, 46 U. S. C. §688, for unseaworthiness, and for maintenance and cure. The complaint alleged diversity of citizenship as a jurisdiction ground (2a to 6a). The defendant filed an Answer and in its Answer, as a separate partial defense, alleged that it was entitled to limitation of liability under 46 U.S.C. §183 *et seq.* (10a). At no time has the defendant filed a petition for exoneration or limitation in admiralty (104a).

The accident occurred on April 26, 1955 in the Hudson River off Weehawken, New Jersey (12a, 14a), when the plaintiff was knocked off a barge while it was being moved out of a slip by defendant's tug. On August 8, 1956 a claim letter was mailed to the defendant on behalf of the plaintiff (104a). The defendant served its Answer setting forth the partial defense of limitation on February 26, 1957 over six months later (104a).

The plaintiff had worked for the defendant about 30 years (12a). He worked as a deckhand and master on tugs in the marine department of the defendant company (12a, 13a). His work involved "towing car floats, barges, lighters and that type of work" (13a). The plaintiff testified (13a):

> "Q. Working in the marine department, were you attached to particular tugboats or were you changed around? A. No, we get the job by bidding, and I bid tug 32, got the job and 32 went into the repair shop and we were put on 20, which is an extra vessel."

At the time the accident happened the plaintiff had been steadily employed as a floatman (13a). He described his duties (13a):

> "* * *. A. When we towed these different barges, tugs and floats, it is my job to go out and surrender the boat, let the lines go as the captain direct. He tells me what he wants, how to do it."

At the time of trial it was established that the defendant had eight tugs operating in the harbor with two extra in reserve (30a, 53a, 57a). The tugs work 24 hours with three different shifts (56a). At the time of the accident more tugs had been regularly employed in the harbor (56a). The orders for movements were either written orders or were given over the radio (31a). The captains of the tugs got their orders from the tug dispatchers and from Captain Henning, supervisor in charge of operations (74a, 76a). Captain Henning's office was located at the end of Pier 2, Weehawken (76a). The accident happened 2 piers away (77a).

The regular vessel, tug No. 32 was in the repair shop on April 26, 1955 (13a). Consequently an old tug No. 20 was used. Tug No. 20 was an "extra boat" (13a). She did not have a regularly assigned crew (65a), but was a temporary substitute when other tugs were in for repairs or were

otherwise unavailable (13a; 34a; 65a; 93a; 96a). She was 80 or 90 feet long (33a; 127), and was 159 gross and 108 net tons registered (126a). She was built in 1912 which made her 43 years old at the time of the accident (33a; 126a). She had been converted from coal to oil some years before (127; 141a). She was harder to handle than other boats (93a). The tug captain had testified (64a):

"Q. The particular tug that was being used, was that No. 20? A. Yes.

Q. Was that your regular tug? A. No.

Q. What was your regular tug? A. 32.

Q. Is that a newer tug? A. Yes.

Q. What happened to No. 32? A. She was in the shop for repairs.

Q. How long? You just had No. 20 as a temporary measure? A. Yes.

Q. Was this the first day that you were using No. 20? A. I believe it was the first day.

Q. How does this No. 20 tug compare with the 32 that you had? A. It was a smaller tug, less power.

Q. Older? A. Much older.

Q. Is it as good as the 32? A. No.

Q. In what respect? A. She doesn't have the power of tug 32.

Q. Is it as good in shifting as the 32? A. No.

Q. In what respect? A. She doesn't have the power of tug 32.

Q. Is it as good in shifting as 32? A. I don't think so.

Q. Why? A. You don't maneuver her like you would 32.

Q. In what respect? Can you describe that to us? A. She don't—it is like an old car and a new car; she don't have the pep."

Another witness, who has worked for the defendant on tugs since 1921 testified (49a):

"Q. Are you back to the story that tug 20 was not of sufficient horsepower capacity? A. Nobody liked the boat to ship with.

Q. A lot of people don't like me. Does that make the boat incapable? A. There is not a man who wants to ship with 20.

Q. That boat has the same horsepower as the high-pressure boat? A. She is a compound boat and more difficult to ship with.

Q. The engines respond when the throttles are shifted? A. She's an awkward boat to shift with.

Q. You mean it makes it tougher up there in the pilots house to issue instructions? A. It makes it tougher for everybody."

On the day of the accident, the crew to which plaintiff was assigned worked from 4 p.m. to midnight (15a). Captain Ford was in charge of Tug 20 and plaintiff was a "floatman". It was raining (14a). They boarded the tug at about 4:00 p.m. at Pier 2 in Hoboken. The crew was "more or less steady group" (58a). They were going to shift barges in the Weehawken terminal (58). They had received orders to do this either in writing or by radio. Orders eminate from Captain Henning, the defendant's marine superintendent or from tug dispatchers on the pier (31a; 76). The captain told the crew that they were going to move the defendant's barge "Jones Point" from the south of pier 4 to the south of pier 2 (31a). The "Jones Point" was all the way in the slip at the bulkhead on the south side of the pier (59a). The slip was about 800 feet long (59a). There were some vessels tied up to the east of the "Jones Point" (60a). The Captain of the tug decided to use a maneuver known as "off-the-corner" to shift the barge (60a). This maneuver was also referred to as "dynamiting" which is sometimes used as a synonym for "fast" or "speedy" (27a; 39a; 85a; 74a). Captain Ford described the procedure used and the accident (67a):

"Q. As you did it from the time you took the barge out that particular evening up to the time of the accident, just what took place. A. This line is from the tug and this line from the barge. We move it out.

Q. Maybe if you get it out of the slip you will have more room? A. We are moving out. After I get out of the ways—

Q. You have attached two lines— A. That's right.

Q —to the barge, and is the barge coming out stern out? A. Stern out.

Q. So you are moving the stern out and the stern is attached to the bow of the tug? A. Yes.

Q. And you have the two lines attached to the tug at the bow? A. Yes. We go out. We are pulling out and I stop my boat. I pull the wheel over. The weight of the barge will carry me around in this fashion. We let go of this line, the line from the barge.

Q. The port side line? A. Yes. Then while we are in this shape—

Q. You are at right angles, the tug, to the stern of the barge? A. The deckhand takes this line and he puts it on here.

Q. He takes the starboard line from the barge and attaches it to the stern of the tug. When he gets that finished, they then put another line from here on to here a backing line.

Q. That backing line is from where to where? A. From the side bitt to the starboard stern corner of the barge.

Q. So that both lines are attached to the same bitt at the starboard corner of the barge? A. Yes.

Q. Is that why they call it off the corner? A. Yes. Then we come around in this fashion. When I come ahead with the tug, that's the way we come.

Q. As you are coming ahead, the tug turns around so as to come close, comes up against the starboard side of the barge? A. Yes.

Q. Do they come together? A. Yes.

Q. Do they hit? A. Yes.

Q. And they bounce back? A. At that moment he threw a line out to this corner and he missed. Our float man was up here.

Mr. Murray: Yes.

Q. He was way up at the stern of the barge? A. Yes, taking care of this line.

Q. You say somebody threw a line and missed. Who was the person who threw the line and missed? A. Mr. Hroncich.

Q. He was stationed at the stern of the tug? A. Yes.

Q. And he threw the line? A. Yes."

The plaintiff testified as to the happening of the accident (24a):

"Q. Tell us where you got to. How far did you get? A. I got, say, possibly here, this side of the cleat. In the meantime these two boats had separated from the bank, so the captain had to come ahead to get these two boats together in order to get the stern line on. So I walked back, possibly right here, so I would be—

Q. Where does your finger point? A. Forward of the bitt.

Q. Ahead of the bitt? A. Yes.

Q. Could you describe where you were at the time? Which finger is showing where you were? A. This one here.

Q. Describe that. A. I would say about two and a half to three feet forward of the bitt on the barge.

Q. Still on the starboard side of this barge? A. Yes.

Q. How wide is this little extension? A. Eleven or 12 inches. That's a guess.

Q. That is where you were standing? A. Yes.

Q. Then what happened? A. The captain came ahead to get the two boats together and I walked back and

they came together with *great force*, they hit hard, and I had my hand on the cable, on the life line, but the force of the blow, the barge went out from under me and I went down between the tug and the barge.

Q. What type of hit was it? Could you describe that?

The Court: He said with great force."

The tug had a draft of about 10 or 11 feet. The barge was empty and drew only a foot of water (83a). In describing the impact between the tug and the barge, one of the crew members said that the "barge was a cigar box against the tug" (83a). Consequently someone on the heavier tug would not feel the impact to the degree that a seaman standing on the light barge would (94a). The plaintiff was caused to fall by the "hard bump" (95a).

There was testimony that there was a proper way to pull the barge out of the slip without the risk of hard contact. Captain Eisenhower, an expert testified to a safe method. He described the method which involves towing off the "tow cleat" and stated that it was the proper method to use "because it prevents the tug and barge from coming together and from giving them that jerking or swinging or other thing" (47a). The method used was quicker but had the hazard of hard contact inherent in it (27a; 48a; 73a; 85a; 95a). The dangerous dynamiting procedure was used with the approval of defendant's marine supervisor (100a; 105a; 106a).

The trial court dismissed the count for unseaworthiness (102a). By stipulation of counsel the court decided the cause of action for maintenance and cure (101a). The Jones Act cause of action was submitted to the jury. However, the court reserved decision on the defendant's motion for limitation, and refused to submit the issues of knowledge and privity to the jury (105a). The jury rendered a general verdict of $75,000.00 for plaintiff (113a). The

defendant's motion to set aside the verdict was denied (114a). Subsequently, the court on the question of limitation, rendered a written opinion granting limitation. He held that the six month condition of 46 U.S.C.A. §185 did not apply. He made a new and separate finding that the cause of the accident was not the "off-the-corner" maneuver itself but was only the result of a "mistake in navigational judgment on the part of the captain" (117a). He also gave the plaintiff $2800.00 for maintenance and cure which he held was not subject to limitation (118a).

The plaintiff then moved for an opportunity to argue the determination of the court as to granting of limitation and in addition for a hearing to determine the value "of the entire maritime unit of defendant employed by it in its maritime operations in New York Harbor," and the "value of the defendant's tug boat No. 20 and barge Jones Point, and the freight then pending" and "the value of all defendant's tug boats and barges served by the master crew list and rosters upon which plaintiff's name was carried as a seaman and for such other relief as the court may allow (121a). The defendant cross-motioned for a hearing to fix the value of tug boat No. 20 and the barge Jones Point only. Plaintiff's motion was denied and defendant's motion was granted (122a).

The court referred the matter to a Commissioner (123a). The court, over objection by plaintiff, limited recovery "to the value of the defendant's, Tug Boat No. 20 and Barge 'Jones Point' " (122a). The commissioner reported a value of $10,000.00 for the tug and $6,000.00 for the barge. Various objections were made to the proceeding on valuation.

The judgment below was affirmed on appeal. The Court of Appeals held that the dismissal of the cause of action based on unseaworthiness was proper. The court also held that in spite of its language 46 U.S.C.A. 185 did not apply in this case and the fact that two prior cases in which the

statute did not apply were originally cases in admiralty where the defense was raised in an admiralty proceeding was not significant. The court also held that the plaintiff had invoked admiralty jurisdiction because a claim for cure and maintenance was triable only in admiralty.

The court agreed that there were two theories of negligence submitted to the jury and that on one of the theories would have precluded limitation. However, the court held it was proper for the trial judge to subsequently select one of the theories submitted and grant limitation on the basis of one theory of negligence. The court rejected plaintiff's allegations as to the functional and economic unit approach to the vessels which should have been included in the valuation and affirmed the court below.

ARGUMENT ON WRIT

POINT I

The general verdict rendered by the jury in favor of the plaintiff was conclusive as to every issue of negligence submitted and it was the burden of the defendant to establish lack of privity and knowledge as to each issue submitted and the defendant failed to satisfy its burden of proof.

The Court of Appeals stated (Pet. 5a):

> "* * * On the first theory of negligence, the excessive violence of the contact between tug and barge was a fault of navigation, which would not preclude limitation of liability. *The second theory of negligence, if found to be the proximate cause of plaintiff's injuries, would preclude limitation, since it was conceded that the Supervisor of the defendant's marine operations knew that the tug boat captains did use the 'off the corner' maneuver.* As the jury returned a general

verdict, it is argued that it is impossible to say which theory of negligence they accepted, and consequently limitation of liability must be denied.

In passing on the limitation issue, Judge MURPHY found that the injury was caused by the excessively severe contact between tug and tow. This finding was in no way inconsistent with the jury's general verdict." (Italics ours.)

The plaintiff, as a result of the general verdict established the negligence of the defendant. The defendant, having alleged limitation as a defense in the civil action had the burden of proving it. *States Steamship Company* v. *United States*, 259 F. 2d 458, 464, 474 (9 Cir. 1958) cert. den. 358 U. S. 933, 79 S. Ct. 316, 3 L. Ed. 2d 305 (1959) rehearing den. 359 U. S. 921, 79 S. Ct. 579, 3 L. Ed. 2d 583 (1959); *Verbeeck* v. *Black Diamond Steamship Corp.*, 269 F. 2d 68, 7 (2 Cir. 1959); *Great Atlantic & Pacific Tea Co.* v. *Brasilei* , 159 F. 2d 661, 665 (2 Cir. 1947) cert. den. 331 U. S. 83 , 67 S. Ct. 1519, 91 L. Ed. 1849 (1947); *The E. Madison Hall*, 140 F. 2d 589, 591 (4 Cir. 1944); *The New York Marine No. 10*, 109 F. 2d 564, 566 (2 Cir. 1940). The defendant was bound by all issues submitted to the jury and the jury verdict was conclusive on *all* issues raised by the pleadings and submitted to the jury. *In re P. Sanford Ross*, 204 F. Rep. 248 (2 Cir. 1913). Cf. *The Teddy*, 226 F. Rep. 498 (D.C. N. Y. 1915); *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 427, 59 S. Ct. 262, 83 L. Ed. 265 (1939). By agreeing to submit all the issues on negligence to a jury for determination by a general verdict as a result of pleading defense of limitation in a jury action, the defendant bound itself by such verdict.

There are numerous reasons why this rule should have been accepted and followed.

First of all, the rule is one which can be efficiently applied and is most likely to produce a sound result. The procedure

followed by the court resulted in overlapping findings of fact with two fact-finders evaluating the same testimony and making independent findings of the same facts. This is neither sound justice or efficient court room practice.

Secondly the plaintiff is a seaman and he sues under the Jones Act for his remedy. Congress has given him a jury trial specifically and by statute. The courts favor the policy set forth in such statute. Accord therefore should be given to the jury's verdict on the issues submitted under the Jones Act cause of action. See *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, 715, 66 S. Ct. 1218, 90 L. Ed. 1534 (1946); *Jacob* v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942). To do otherwise would impinge upon the function of the jury to determine the issues of negligence and would give preference to the much criticized doctrine of limitation over the announced policy of having ngeligence issues determined by a jury.

Thirdly, the modern view is to regard the limitation statute in derogation of the rights generally afforded under maritime law.

Finally, it must be recognized that a seaman is a ward of admiralty. The courts therefore have generally fashioned the rules of law to favor the seaman where the rules of evidence and burden of proof are concerned. See *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942) where the court held that the burden was upon the one setting up a seaman's release to establish the facts concerning its validity, etc., *Schultz* v. *Pennsylvania Railroad Company*, 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668 (1956) setting forth a liberal standard of proof of negligence by circumstantial evidence, and *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 431, 59 S. Ct. 262, 83 L. Ed. 265 (1939) where the court gave a liberal interpretation of the Jones Act stating that seamen were "wards of the admiralty."

Recognition of the basic fact that a general verdict operates to foreclose negligence issues appears in the "usual order" granted where a petition has been filed. In *Star Brick Corporation* v. *Johnson*, 262 F. 2d 251 (2 Cir. 1959) the petitioner had brought a proceeding for the exemption from a limitation of liability. The court granted a conditional restraint of the proceedings in the state court brought there by the claimant. The court entered the "usual order" in granting the restraint. Objection was made to certain terms of this order. Chief Judge CLARK stated at page 252 in upholding one of the stipulations in the "usual order":

> "* * *. Stipulations that the admiralty court has jurisdiction to determine the claim to limitation or exoneration and that claimant waives any claim of *res judicata* on these issues from the state court judgment are necessary; * * *"

See also *Petition of Red Star Barge Line*, 160 F. 2d 436, 438 (2 Cir. 1947); *Great Lakes Dredge & Dock* v. *Lynch*, 173 F. 2d 281 (6 Cir. 1949); *In re Trawler Gudrun, Inc.*, 101 F. Supp. 586 (D.C. Mass. 1951).

In all of the above proceedings it was the claimant, asking permission to proceed with his action in the state court, who was required to stipulate that the benefits he would get from a jury verdict in the state court action could not be used in the limitation action to the extent that they would apply in the limitation action. However, in this action the shoe is on the other foot. The defendant, in a civil action raises the defense of limitation. It does not seek to prevent the plaintiff from pursuing his remedy in the civil side of the court. Rather it seeks to interpose a defense which it could not pursue by a petition in admiralty because of time limitations. The plaintiff, under these circumstances does not have to concede or waive any benefit he may obtain from the jury verdict. The defendant by

proceeding with limitation as a defense, in effect, accepted the fact that a jury would decide all the factual issues which naturally would be decided by it and agreed to be bound by a jury verdict.

There would be an unreconcilable conflict between two fact-finders if the trial judge, in weighing the evidence, decided that there was not sufficient evidence of negligence to justify a finding of negligence by the court after the jury rendered a verdict based on negligence. On the one hand the court could not make a finding on privity without a prior finding on negligence. On the other hand, unless the right of trial by jury in a Jones Act case is to be emasculated, a jury finding of negligence must be honored. Certainly it is not the function of the court to guess what the jury decided when it rendered its verdict. The jury verdict must be accepted as conclusive on all the issues which the jury properly had before them for decision. There is no reason in the policy behind the limitation statute which compels a different result. The proper guarding of the interests of the seaman in a jury trial and the proper administration of justice require that the burden be on the one raising the defense to establish lack of privity and knowledge as to each issue of negligence submitted to the jury. This the defendant did not do.

POINT II

The trial court erred in refusing to submit the issue of unseaworthiness to the jury.

There was evidence from which the jury could have found that tug No. 20 was unfit for the purpose of shifting barges and therefore was unseaworthy. The tug originally had run on coal and had been converted to oil (127a; 141a). She was 43 years old at the time of the accident (33a; 126a). She was used only as an "extra boat" (13a). There was evidence that she didn't have "power" or "pep" (64a; 65a), that she was awkward, hard to handle, and difficult to

shift (93a; 65a; 49a; 50a; 96a). We note also in the subsequent limitation proceeding that the defendant's expert valued the vessel at less than 6% of its replacement value (134a; 133a). Since the maneuvering of the tug and hence its maneuverability was an issue in the case, the question of whether the tug was seaworthy for the purposes employed was a jury question. If it were unseaworthy, it would follow that the defendant was not entitled to limitation since it assigned the work to its tugs and had privity and knowledge.

The court granted a motion for dismissal of the unseaworthiness count at the end of the case (102a).

In the case of *McAllister Lighterage Line* v. *Insurance Co.*, 244 F. 2d 867 (2 Cir. 1957) Judge LOMBARD defined seaworthiness at page 870:

> "* * *. Seaworthiness is the ability of a vessel *adequately* to perform the particular services required of her on the voyage she undertakes * * *" (Italics ours.)

The fact that a vessel is no longer fit to do its job because of its age or because of antiquated design has been recognized in many cases. In *Navegacion Castro Riva* v. *The M.S. Nordholm*, 178 F. Supp. 736 (E.D. La. 1959) the court denied limitation. Among other things Judge J. SKELLY WRIGHT commented at page 739:

> "Certainly the Theogennitor was too under powered to control her load. The most persuasive proof of this fact is the fact that she did not. She was unable to turn the Point. To excuse this inability and to place the blame for this collision on the current would be to open the season on shipping in the Mississippi River. Vessels are power to control the current, not to let the current control them. This vessel, built in a wartime emergency, was marginally powered at birth with 2,500 horsepower. And since that time, as her own pilot

testified, many of her horses have long gone to pasture * * *."

See also *Jacobus* v. *The Triboro No. 22*, 267 F. 2d 547 (2 Cir. 1959); *Dexter-Carpenter Coal Co.* v. *New York O. & W. Ry Co.*, 50 F. 2d 270 (D.C. N. Y. 1931). In view of the facts and the inferences to be drawn therefrom set forth above, a jury could have found that the vessel was not adequate to shift barges in a confined area and was unseaworthy. *Troupe* v. *Chicago D. & G. Bay Transit Co.*, 234 F. 2d 253 (2 Cir. 1956). The court erred in taking the issue from the jury. The case should be reversed and remanded for jury findings on this issue since, if unseaworthiness is established, privity and knowledge with respect to such unseaworthiness will also be established.

POINT III.

The trial court erred in limiting plaintiff's recovery to the value of Tug 20 and the barge Jones Point and in refusing to include other vessels involved in defendant's enterprise in New York Harbor and freight pending thereon.

It has been recognized that several vessels may be included in a valuation in a limitation proceeding. See, for example, *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663 (1927), including a barge and tug; *The Bordentown*, 40 F. 682 (D.C. N. Y. 1889) involving two tugs; *The Columbia*, 73 F. 226 (9 Cir. 1896); involving a tug and a barge; *The Capt. Jack*, 169 F. 455 (D.C. Conn. 1909) involving a lighter with hoisting apparatus and a tug; *Shipowners' & Merchants' Tugboat Co.* v. *Hammond Lumber Co.*, 218 F. 161 (9 Cir. 1914) involving two tugs; *The Alvah H. Boushell*, 38 F. 2d 980 (4 Cir. 1930) involving two tugs; *The No. 5 Motor Lifeboat*, 57 F. Supp. 624 (S.D. N. Y. 1944) involving a lifeboat carrying seamen from three vessels.

These cases recognize that Section 183 in referring to "the interest of such owner in such vessel" does not intend to limit liability to only a vessel directly at fault. 46 U.S.C.A. §183. These cases recognize that the courts cannot be mechanical in interpreting the statute, but must examine the indicia going to the true nature of "the vessel" and its relation to the incident and the individuals or things involved in the claim.

The cases justify the inclusion of more than one vessel in a limitation proceeding where there is common ownership and there is a contractual relationship or a "common venture" of some kind. See the comments of Judge MEDINA in *Deep Sea Tankers* v. *The Long Branch*, 258 F. 2d 757, 774-5 (2 Cir. 1958), cert. den. 358 U. S. 932, 79 S. Ct. 316, 3 L. Ed. 2d 305 (1959).

In the case of *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663 (1927), Mr. Justice SUTHERLAND commented at page 328:

> "The fact that we are dealing with vessels, which by a fiction of the law are invested with personality, *does not require us to disregard the actualities of the situation*, namely, that the owner of the tug towed his own barge as a necessary incident of the contract of affreightment, and that the transportation of the cargo was in fact effected by their joint operation. * * *"

The court concluded at page 332:

> "* * * But the present libel is for a loss of cargo, and falls within the principle of The Columbia, supra, where, upon facts substantially identical with those here, a surrender was required *of the combined means* by which the company undertook the transportation of the cargo." (Italics ours)

The situation before this court arises out of the employment contract. This contract and the duties of master and

servant arising out of it are a basis for application of the "combined means" theory of the *Sacramento Nav. Co.* case *supra.*

In *Standard Dredging Co.* v. *Kristiansen*, 67 F. 2d 548 (2 Cir. 1933) Judge LEARNED HAND, discussing limitation in a Jones Act case commented at page 550:

> "That the National Dredging Company's duty to Kristiansen 'involved contractual obligations' seems to us clear. * * * *Sacramento Nav. Co.* v. *Salz, supra*, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663; rather we read it as meaning that when the 'duty violated, though imposed by law, presupposes at least the relation of master and servant, *the owner must surrender all those vessels which share in the execution of the venture*; collectively they are 'such vessel' within R.S. §4283. * * *"

The duties existing between the plaintiff and the defendant railroad arose out of the status of the plaintiff as a seaman employed by the defendant (2a; 12a). Mention was made of union agreements during the course of the trial (53a; 55a). As Judge LEARNED HAND pointed out in the *Standard Dredging Co.* case, *supra*, at page 551:

> "* * *. True, such actions are ordinarily brought upon the case, but for the matter of that, so originally were all assumpsits; and actions against common carriers are often still so brought, although they are clearly 'contractual.' The form of the remedy is of no moment; *the duty is raised out of the contract of service*, and while it would of course be untrue to say that the master must in fact undertake its performance, he may not be charged with it unless he accepts the servant in his employ. * * *" (Italics ours)

In the case of *In Re United States Dredging Corporation*, 264 F. 2d 339 (2 Cir. 1959) cert. den. 360 U. S. 932, 79 S. Ct. 1452, 3 L. Ed. 2d 1545 (1959) it was held that even though

the death of two persons occurred on a motor launch as a result of a "flash fire", the owner of the vessel, in order to claim limitation had to surrender a dredge, two other motor launches, and two barges in addition to the motor launch on which the accident occurred. The theory of the holding was based on the fact that all the vessels were engaged "in the same venture at the time" i.e., performing a contract to dredge the harbor. Among other things, Judge LEARNED HAND stated at 341:

> "* * *: Not only was the 'Magic City' without power of propulsion, but the men who worked upon her had to be taken back and forth at night by the launches, her oil and other supplies to be brought to her by still other craft. *In short, all these attending 'vessels' were necessary to the performance of their owner's contract with the town.*"

> "In Sacramento Navigation Co. v. Salz, 273 U. S. 326, 47 S. Ct. 368, 71 L. Ed. 663, although the case arose under the Herter Act, the Court resolved it by application of the same rules that limit a shipowner's liability; and following the doctrine of The Columbia, 9 Cir., 73 F. 226 held that, when a barge and tug were transporting a cargo of barley, both were deemed to be a single 'vessel', and the tug must be surrendered as well as the barge. In Standard Dredging Co. v. Kristiansen, 2 Cir., 67 F. 2d 548, a seaman employed on a dredge was injured while working on an unseaworthy barge, which was used as a tender to supply oil to the dredge, and which at the time was not made fast to her. We held that the dredge must be surrended as well as the barge, *because each was part of the means that the shipowner was using to perform its contract.* * *. However, it is at least doubtful whether the motives that originally lay behind the limitation are not now obsolete; and certainly we should now have no warrant for extending its scope, when the liability

is for personal injury arising from the shipowner's fault." (Italics ours)

What are the "actualities of the situation" in the present case, *Sacramento Nav. Co.* v. *Salz supra*. The defendant is a common carrier. It operates its tugs and barges in the New York Harbor area 24 hours per day with three crews, each with its own master, working in 8 hours shifts (53a). The crews are selected according to a master list (30a; 54a; 55a; 56a; 80a). All tugboat captains and their crews came under the supervision of the defendant's supervisor of marine operation (101a). His office is located at the end of Pier 2, Weehawken, N. J., two piers away from the scene of this accident (75a; 77a). He gave orders to tug captains through tug dispatchers located on the pier (31a; 76a). The tugs were used to tow barges and floats (13a).

On the day of the accident, the plaintiff was one of a "more or less" steady crew who boarded defendant's Tug 20 at Pier 2, Weehawken, N. J. The accident happened near Pier 4 about two hours later (58a). Captain Ford testified (58a):

> "Q. What were your orders when you got aboard Tug 20, what were you going to do? A. We were going to *shift barges* in the Weehawken terminal."

He testified that between 5:00 p.m. and 6:00 p.m. they were engaged in shifting the barge Jones Point from the south side of Pier 4 to the south side of Pier 2 in Weehawken, N. J. (59a). There were other barges in the pier area (66a). This was a New York Central pier area (125a; 126a). The defendant did not offer an evaluation as to any of the barges which the defendant railroad wished to have Tug 20 move or which Tug 20 did in fact move in the course of its "shifting operations." Nor was any offer made concerning the work which was to be done by Tug 20 during the 8 hours period the crew was to remain on board.

This case did not involve any "voyage" in the traditional sense where there was a distinct point of origin for the trip and a distinct point of termination with a lapse of hours, days, weeks, or months between the two points. What it did involve was a series of short errands during the course of the centrally controlled (by the tug dispatcher) continuous activity of the tug with a crew that served on board 8 hours at a time. In defining the enterprise upon which the defendant's vessel was engaged at the time of the accident, it is no more fair and reasonable to say that it was merely shifting a single barge than it would have been fair and reasonable in *In Re United States Dredging Corporation, supra*, to have held that the definitive enterprise there was the instant activity of the single launch involved in the fire in that case. Limiting defendant's maritime activities in this way does not follow the facts of economic life. It serves no useful purpose and it makes an obsolete and much criticized statute, extremely arbitrary and capricious in application.

Captain Ford testified (65a):

"Q. The particular tug that was being used was that No. 20? A. Yes.

Q. Was that your regular tug? A. No.

Q. What was your regular tug? A. 32.

Q. Is that a newer tug? A. Yes.

Q. What happened to No. 32? A. She was in the shop for repairs.

Q. How long? You just had No. 20 as a temporary measure? A. Yes.

Q. Was this the first day that you were using No. 20? A. I believe it was the first day.

* * *

Q. And No. 20 is the old car? A. Yes. That's the only way I can describe it.

Q. And the minute 32 is available you get off 20 and go back to 32? A. Yes."

The plaintiff was regularly assigned with other members of the crew to Tug 32 (13a; 93a; 96a). The Tug 32 to which the plaintiff would have been assigned normally was a new, valuable, efficient tug. It was being repaired on the day of the accident. In its stead a tug which was about ready for retirement was substituted. Why shouldn't the original tug, at least, have been included in the valuation together with the substitute? Does it encourage American shipping to have a railroad use old inefficient tugs in place of modern ones? From the liability viewpoint this situation would give a bonus to a railroad where it used equipment which is almost ready for retirement rather than modern efficient vessels. Certainly Congress didn't intend this and the courts should not interpret the limitation statute to mean that Congress did so intend.

As the record indicates the defendant was conducting a continuous, single, and joint enterprise in New York harbor. Three different crews would operate a single tug (53a). Crews would be made up from a master list and would get their work in accordance with an agreement between the defendant and the seamen's union as to seniority, etc. (55a). If one of the regular tugs was out for repair, the defendant would use one of its older stand-by substitute tugs (65a). In short, both men and tugs were interchangeable parts and their activities were centrally controlled and directed. All of these activities were part and parcel of the defendant's railroad operations. Shippers in using the services of the defendant did not engage the services of a particular barge or a particular tug. The parties did not contemplate that the defendant would make a specific voyage across the Hudson to deliver goods. Instead the parties contemplated that the defendant as an extension of its services as a railroad and a common carrier would move such freight on and across the local waters as was necessary to supplement ordinary railroad operations. *All of the defendant's tugs and barges were jointly involved in this*

operation. The situation is different from the traditional sea voyage where seamen sign articles for a specific vessel, where ships put to sea for days and months, where seamen sleep and reside on the vessel for long periods of time, where there are substantial distances between stops, and where cargo is carried for long distances and are usually shipped by specific vessels over specific routes. To hold that a voyage may consist of shifting a barge from a position A to position B in defendant's slip or from slip X to slip Y is to fractionalize the work of the defendant's tugs to the point where the voyage concept is meaningless. A single tug can shift many vessels in the course of a single eight hour shift. It can escort or pull one or several barges. It is therefore unreal to equate this type of darting back and forth of a railroad harbor tug with "the voyage" of a seagoing vessel in the traditional sense.

In *Whitcomb* v. *Emerson*, 50 F. Rep. 128 (D. C. Mass. 1892) the defendant sought recovery for repairs to a fishing vessel. The vessel had cruised during an entire season making numerous trips out of Boston Harbor. The defendants sought limitation. In denying this Judge NELSON stated at page 129:

> "* * *. But it is clear that this claim cannot be maintained. Their offer makes no allowance for the fares of fish caught and sold during the season. By the terms of the fishing contract, the cost of repairs should have been deducted from the proceeds of the fish caught and sold, and if this was not done, it was through no fault of the libelant. The season's cruising is to be counted as a single voyage, and the earnings during the whole season's fishing are, equally with the vessel, liable for debts contracted on the vessel's account. The amount of the earnings does not appear, and they must be presumed to exceed the debts. As there is no offer to pay the earnings into court, or to apply them to the

payment of the debts, there is no exemption from liability from the debts under the statutes referred to."

Cf. The William J. Riddle, 111 F. Supp. 657 (S. D. N. Y. 1953) which held that the charge of carrying animals to Poland must be included in the "earnings of the voyage" where the accident occurred on the return trip; *The San Simeon*, 63 F. 2d 798 (2 Cir. 1933) where it was held that "pending freight" did include all the freight on a voyage from the Pacific coast to New York and Philadelphia even though she had already discharged some of her cargo at New York; and *In re W. E. Hedger Co.*, 59 F. 2d 982 (2 Cir. 1932) the court denied defendant's contention that its liability for "freight pending" should be limited to a percentage of the entire earnings of a tug and tow where it was held that the tug alone was the vessel to be surrendered.

One issue before the court is the measure to be used in determining "the voyage" which in turn is the basis for determining the "freight pending." A "voyage" is not merely a trip between two stops. It is a term which does not have a fixed meaning in all circumstances. This is illustrated by *Gardner v. The L. N. Danzler*, 177 F. Supp. 736 (E. D. Va. 1959) wherein Judge Hoffman commented at page 741:

> "The term 'voyage' has no fixed meaning, but is dependent upon the particular situation. La Bourgogne, 210 U. S. 95, 135, 28 S. Ct. 664, 52 L. Ed. 973. The interpretation of the word 'voyage' must be determined by reference to its context in the statute to be applied and by determining the Congressional intent in enacting the statute sought to be enforced. Buttimer v. Detroit Sulphite Trans. Co., D. C. E. D. Mich. 39 F. Supp. 222. As was said in The John Martin, 13 Fed. Cas. pp. 694, 697, No. 7, 357:
>
> "The term "voyage", however, as applied to vessels engaged in foreign and inter-state commerce, within

> the meaning of the maritime law, is clearly inapplicable to a tug, making short trips, generally not from port to port, but from one body of water to another, merely furnishing the motive power to other vessels. * * * It would be a misnomer to apply the term "voyage" in the sense of the maritime law to such trips.' "

The defendant at the time of the accident was using its tug for some economic purpose. Certainly the tug, by its activities was contributing to the earnings of the defendant. Yet, the defendant made no tender or offer of proof based on the "freight pending." The statute, by use of this phrase, contemplated that the economic value of the use of the tug be included and the defendant railroad did not satisfy its burden merely by showing that an empty barge was being moved.

The trial court erred in the limited standard it applied. The court gave as the reason for limiting recovery to the value of the tug and barge that "only two vessels, tug boat #20, and the barge Jones Point, were involved and none of the other equipment belonging to the defendant has any bearing or connection with this accident in any shape or form" (122a). For reasons set forth herein the court failed to apply the proper test and this conclusion was erroneous. The judgment below relating to the valuation in the limitation proceeding should be reversed and the case remanded for a further valuation.

POINT IV

The defendant did not seek to obtain the remedy of the partial defense of limitation of liability within the time allowed to pursue this special admiralty procedure.

The Court of Appeals recognized in its opinion that (Pet. 3a):

> "* * *. The Railroad was notified of plaintiff's claim by a letter mailed on August 8, 1956 and did not file its plea until more than six months thereafter * * *."

46 U.S.C.A. §185 provides in part:

> "The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter * * *. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease * * *."

The Court of Appeals, following *The Chickie*, 141 F. 2d 80 (3 Cir. 1944) and *Deep Sea Tankers* v. *The Long Branch* 258 F. 2d 757 (2 Cir. 1958), cert. den. 358 U. S. 933, 79 S. Ct. 316, 3 L. Ed. 2d 305 (1959), held that §185 did not apply and that the fact that these two precedents, *supra*, were cases where the defense was raised in an admiralty proceeding did not distinguish them from the present case where the matter was raised merely by way of defense in a civil action which would subsequently require a petition to be filed to invoke admiralty jurisdiction (Pet. 4a). The defendant never filed a petition for limitation in this case.

This Court has not passed upon the problem created by passage of the 1936 amendment in 46 U. S. C. A. §185 pro-

viding for a six month period within which an owner may petition for limitation of liability and the rule stated in *Langes* v. *Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520 (1931) and *Ex parte Green*, 286 U. S. 437, 52 S. Ct. 602, 76 L. Ed. 1212 (1932). These cases held that while a state court has no right to determine the question of the owner's right to a limited liability, it may proceed with a damage claim of a single claimant, if there is no issue as to the owner's right to limitation of liability. However, if an issue on the right to limitation is raised this issue can only be determined by an admiralty court. Cf. *Pershing Auto Rentals, Inc.* v. *Gaffney*, 279 F. 2d 546, 550-552 (5 Cir. 1960); *Great Lakes Dredge & Dock Co.* v. *Lynch*, 173 F. 2d 281 (6 Cir. 1949); *Petition of Red Star Barge Line*, 160 F. 2d 436 (2 Cir. 1947), cert. den. 331 U. S. 850, 67 S. Ct. 1741, 91 L. Ed. 1859 (1947); *The Steamtug S & H No. 7 Inc.*, 32 F. Supp. 282 (E. D. N. Y. 1940).

This was an action brought on the civil side of the court. The situation was the same as if suit had been brought in a state court. Diversity had been pleaded as well as the Jones Act provisions (2a, 4a). The jurisdiction of the Admiralty Court was not invoked. The Court of Appeals in its opinion stated (Pet. 3a):

> "* * * Moreover, the plaintiff did invoke admiralty jurisdiction in suing for maintenance, and Judge Murphy as an admiralty judge determined the right to limition of liability."

This statement is erroneous. There is a difference between a civil court disposing of an issue as to which a plaintiff does not have a right to trial by jury and a civil court attempting to give a remedy which is exclusively a remedy of the admiralty court. It is proper to bring an action for maintenance and cure on the civil side. *Garrett* v. *Moore McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942); *Connolly* v. *Farrell Lines Inc.*, 268 F. 2d 653 (1 Cir.

1959), cert. den. 361 U. S. 902, 80 S. Ct. 208, 4 L. Ed. 2d 158 (1959); *Pate* v. *Standard Dredging Corp.*, 193 F. 2d 498, 502 (5 Cir. 1952). The plaintiff did not invoke the admiralty jurisdiction of the court by including a count for maintenance and cure. It is well established that this is an issue which can be tried in a state court or on the civil side of the federal court where diversity is present. Diversity was present in this case and was pleaded. There was no real dispute on maintenance and cure and the plaintiff's attorney, at trial, to simplify the issues agreed with defense counsel that the court would decide that issue and that the stipulated rate would be $8.00 per day (101a). This was not an invocation of admiralty jurisdiction. It did not necessitate a change of the jurisdictional robes of the trial judge.

Where the action is commenced on the civil side, the only procedure for invoking the jurisdiction of the United States District Court sitting in Admiralty, is by way of a petition under 46 U. S. C. A. §185. This section, as a condition of invoking this special relief, requires that the petition be filed within six months after notice. The six month notice provision serves several functions. It helps to bring the matter before the court with reasonable promptness after a maritime accident; it requires the shipowner to put up the vessel or a bond with reasonable promptness after an accident thereby lessening any chance that such assets as are part of the fund may not be available when the action is terminated; and it requires the shipowner to take affirmative action to assert his special priyilege.

The defendant, in effect, must argue, in order to sustain the action of the court below, that the defense of limitation of liability properly was heard by the District Court sitting on the Admiralty side. It is clear that a contested limitation claim can only be determined in Admiralty. *Langes* v. *Green*, *supra*. The defendant must ask that the matter be deemed to have been brought into the Admiralty side *as if it had brought a petition for limitation there.*

This is the means of invoking Admiralty jurisdiction where the original claim is made in an action commenced in a state court or on the civil side of the District Court. See U. S. Supreme Court Rules of Practice in Admiralty and Maritime Cases, Rule 51; 46 U. S. C. A. §185. The defendant therefore not only seeks to be relieved of the obligation to formally file a petition (as to which it is out of time) but also asks the court to ignore the condition attached by Congress to the exercise of its special privilege.

Plaintiff contends that it was improper for the court to entertain this defense because the defendant never sought to obtain its remedy from an admiralty court and, in the alternative, if the procedure followed below is deemed sufficient to allow the District Court sitting as an admiralty court to pass on this defense, the time provision of Section 185 would apply because it provides the only method by which the shipowner can invoke Admiralty jurisdiction even if he does so in an informal manner when suit is commenced on the civil side originally.

The defendant was bound by the six month provision incorporated in Section 185 because procedurally it could not obtain the special benefits provided by Section 185 without the use of Section 185. If the court for any reason of procedural expediency dispenses with the requirements of a formal petition under Section 185, there is no justification for ignoring all the requirements of this statute, and the defendant should not be permitted to avoid its conditional provisions relating to time.

The case of *The Chickie*, 141 F. 2d 80 (3 Cir. 1944) cited by the courts below, which we believe was wrongly decided, is distinguishable. The opinion does not adopt the interpretation of earlier cases or the restrictive cannons of statutory construction, and the confining philosophy of modern courts toward the special privilege of limitation of liability. See *Cantwell* v. *Meade*, 120 F. Supp. 406 (E. D. N. Y. 1954); *The Joseph O'Donnell; The S & H No. 1*, 37

F. Supp. 120 (E. D. 1940); *The Irving*, 33 F. Supp. 59 (S. D. N. Y. 1940); *The Grasselli Chemical No. 4*, 20 F. Supp. 394 (S. D. N. Y. 1937). The important distinguishing feature is that *The Chickie* case was commenced in Admiralty and hence, once the defense was raised, the Admiralty court, without further recourse to its jurisdiction, had full powers to apply all maritime remedies. *The Chickie* was followed in this Court in *Deep Sea Tankers v. The Long Branch*, 258 F. 2d 757 (2 Cir. 1958) cert. den. 358 U. S. 933, 79 S. Ct. 316, 3 L. Ed. 2d 305 (1959). This also was an action in Admiralty. The courts in those cases were not confronted with situations where the defendant in a civil action *had to resort to the right afforded by Section 185 to petition for limitation* in order to give the admiralty court jurisdiction.

Let us assume that the plaintiff had instituted his action in a state court instead of in a federal court. Upon the challenge being made to the partial defense of limitation the defendant would have to invoke the jurisdiction of Admiralty to obtain the benefits of this defense. He could do this only under the provisions of Section 185. If he did not proceed within six months of notice of claim the defendant's petition would be denied and his partial defense as set up in his Answer in the state court action would be meaningless. See *In re Allen N. Spooner & Sons Inc.*, 255 F. 2d 584 (2 Cir. 1958); *In re Donnelly's Petition*, 138 F. Supp. 823 (N. D. Ohio 1954), aff'd 230 F. 2d 169 (6 Cir. 1956); *The Maine*, 28 F. Supp. 578 (D. C. Md. 1939) aff'd 107 F. 2d 373 (4 Cir. 1939). At the time Congress amended the law in 1936, a limitation proceeding in Admiralty was required to give the complete remedy where limitation is raised as a partial defense in a civil action and the issue was not conceded. Those who drafted and passed the amendment which required the shipowner to assert his special privilege within six months after notice of claim if he were to obtain the benefit of the statutory privilege must have been aware of this. The cases of *Langes v. Green*

and *Ex Parte Green, supra*, which had been decided a few years before, set forth the specific rule concerning the exclusive jurisdiction of admiralty over this form of maritime relief. Even if this defense was pleaded in an answer in a civil action, where this defense is contested, a petition in admiralty was always necessary to protect the shipowner's privilege. It would have been simple for the drafters of the 1936 amendment to insert words in the statute permitting a petition in admiralty to be filed after six months if the defense were raised in a civil action. They did not do this. In view of the drastic effect the limitation of liability statute has on the rights of injured seamen there is every reason to suppose the drafters deliberately did not do so. It makes little sense to say that Congress intended to restrict the shipowner when he used one procedure but not when he used the other.

The courts below should have denied the remedy of limitation of liability on the ground that the defendant failed to comply with the requirement of the statute and invoke the jurisdiction of the admiralty court within six months after claim, and therefore the court was without power to grant this special remedy.

POINT V

The court erred in failing to submit the issues of knowledge and privity to the jury along with the negligence issues.

The established law has held that the issues of fact peculiar to limitation are the exclusive province of the admiralty court. However, the court below in justifying a distinction between the six months requirement for filing a petition in admiralty to obtain limitation and the judicial interpretation which imposes no such limitation where the issue is raised only as a defense in a civil action commented (Pet. 4a):

"* * * The rule for which appellant contends disregards the desirability of one trial only, where all rights can be fairly decided in a single proceeding. * * *"

If this is to be the determinative factor, then it would appear that there is no sound reason why the factual issue of privity and knowledge should not be determined along with the factual issue of negligence with which they are intimately connected. The plaintiff had requested that this issue be submitted to the jury (105a). The trial court specifically ruled he would "reserve myself all of those questions" (105a).

The Jones Act specifically provides that a seaman "may maintain an action for damages at law with the right of trial by jury" 46 U.S.C.A. 688. The partial defense of limitation of liability is a statutory one. If raised in a civil action the defense is at best a matter of statutory substantive law to be determined in accordance with the procedure of the court where it is raised. Under Point IV of this brief we develop the point concerning the lack of jurisdiction of a state court or of a federal court sitting on the civil side to grant the remedy of limitation of liability. However, even if the state court or the federal court sitting on the civil side had jurisdiction to determine the partial defense of limitation of liability there is no reason why the factual issues involved therein should not be treated as any other factual issues in a civil action.

Where, as here, the issue of limitation is raised in a civil action as a matter of defense based on a limitation statute rather than the general maritime law, there is no reason why the policy announced in the Jones Act and in the diversity of citizenship jurisdiction of the court should not be followed.

The Jones Act gives the seaman the right to have all issues relating to negligence determined by a jury and, even assuming that the remedy afforded by the Jones Act

is subject to limitation, there is nothing in that statute which compels a seaman to give up his right to trial by jury.

Furthermore, assuming that the court was not required to submit the privity issue to the jury, but could have done so as a matter of discretion, it was an abuse of discretion not to have submitted the issue to the jury. Policy considerations for the promotion of speedy, efficient, and consistent justice would require the submission of the privity issue to the jury if the matter is not deemed exclusively an admiralty court problem. *Cf. Bartholomew* v. *Universe Tankships, Inc.*, 263 F. 2d 437 (2 Cir. 1959), cert. den., 359 U. S. 1000, 79 S. Ct. 1138, 3 L. Ed. 2d 1030 (1959).

In the present case the close connection between the issues of negligence and proximate cause and the problems of "knowledge and privity" is fundamental. Unless one knows what the grounds of negligence are, he cannot determine whether there was "privity" with reference to such negligence. For example, a jury may believe certain witnesses and conclude that there were four grounds of negligence. A Judge sitting without a jury, if not foreclosed by the jury verdict, might disbelieve the same witnesses and conclude that there was no substantial evidence of negligence as to all or any of the grounds. What should be his standard in reviewing "knowledge and privity"? May the witness, whose testimony was accepted by the jury to establish negligence, be ignored by the judge in determining the question of "privity" relating to the same negligence? Should the court try the negligence issue *de novo* or should he try to guess what factors led the jury to render a verdict for the plaintiff and pick up the "privity" questions where the jury left off its negligence considerations? Obviously it is not sound judicial practice to open up the possibility that two fact-finders in the same case may make conflicting findings of fact which would produce one result on one aspect of the case and an entirely different result on the other aspect of the case.

The court below erred in not submitting the "knowledge and privity" issues to the jury. If it had done so it would have avoided the problems inherent in divided fact-finding. The defendant in this case chose to raise the defense by way of answer in a civil action. It did not, institute any action on the Admiralty side of the court. All issues of fact including the knowledge and privity issues should be determined by the jury in the civil action in the one trial, if the matter is not deemed exclusive for Admiralty.

If limitation is not denied on the grounds set forth under the other points herein, the matter should be reversed and remanded for a jury trial.

POINT VI

The limitation of liability statute as interpreted below is arbitrary, harsh, and fails to provide equal protection of the laws and deprives plaintiff of property without due process of law.

In the present case the plaintiff obtained a verdict of $75,000.00 on a Jones Act cause of action which was reduced to $18,800.00 plus interest. The result is discriminatory:

a. If another employee of the defendant railroad were injured in the same accident but suffered only $10,000.00 worth of damage he would get full recovery. Therefore the more severely a man is injured the smaller is his actual percentage of recovery.

b. If the piece of equipment involved which merely provides the *locus* of the accident were new rather than old and obsolete and hence was worth more than $75,000.00 the plaintiff would obtain a full recovery.

c. The Jones Act which is regarded as liberal legislation for the benefit of seamen cannot provide equal benefits to all seamen, their widows and children where the limitation statute is applied.

The Limitation statute, as applied, produces absurd and harsh results without any possible relation to any valid objective which may be asserted on behalf of this legislation. The plaintiff in this case usually worked on a newer and more expensive tug. If this tug were in use the day of the accident he would have had a full recovery. Because an obsolete substitute tug was being used on the day of the accident, the courts below, under their interpretation of the Limitation statute limited plaintiff to a small fraction of his full recovery.

The Limitation of Liability statute has been the subject of critical comment by modern judges and legal writers. Mr. Justice BLACK in *Maryland Cas. Co. v. Cushing*, 347 U. S. 409, 437, 74 S. Ct. 608, 98 L. Ed. 806 (1954) commented, "Judicial expansion of the Limited Liability Act at this date seems especially inappropriate." Judge LEARNED HAND in *In re United States Dredging Corporation*, 264 F. 2d 339, 341 (2 Cir. 1959) ruminated that "it is at least doubtful whether the motives that originally lay behind the limitation are not now obsolete." See also the comments of Judge FOLEY in *In re Reading's Petition*, 169 F. Supp. 411, 413 (N. D. N. Y. 1960) and see *Gilmore & Black, The Law of Admiralty* (1957) §10-3, §10-4 p. 666; *Robinson on Admiralty* (1939) §117 at pages 878-879; 24 N. A. C. C. A. Law Journal (Nov. 1959) pages 224-226.

The conditions which prevailed when the limitation procedure was first introduced and interpreted have drastically changed. Professor Robinson pointed out, *Robinson on Admiralty* (1939) §117, page 878:

> "The 1851 Act was passed in the great days of sail. Our shipping was a major national interest but the self-propelled vessel had not yet been introduced to lessen sea hazards. Other nations gave the maritime venturer an incentive that ours did not and the statute was at once an equalizing factor and an inducement to

the maritime entrepreneur. Its premable stated that it was for the purpose of encouraging shipping. Of the community of interest at sea pointed out in the discussion of salvage and general average, it is another phase. Ship and cargo were alike exposed to hazards. There was insurance to be had for both from those who sold insurance. The statute limited the ship's 'insurer's' liability to the value of the ship. The owner 'insured' only with the one vessel. *The limitation in 1851 operated largely against property claims. The action for wrongful death had not yet been invented for maritime deaths, and the statute's aspect as a subsidy at the expense of seafaring employees and passengers was not yet apparent.*" (Italics ours.)

Professors Gilmore and Black suggest in their text, *Gilmore & Black, The Law of Admiralty* (1957) §10-4, page 667:

"Judicial attitudes are important. There is at least some reason to believe that the judicial attitude in the second half of the twentieth century will be on the whole hostile to the limitation idea, that the early cases will be whittled down if they are not flatly overruled, that the statute, even without further limiting amendments, will be narrowly and not expansively construed. Such an attitude reflects, it is suggested, not so much hostility to the shipping industry *as a recognition of the fact that the Limitation Act, passed in the era before the corporation had become the standard form of business organization and before present forms of insurance protection* (such as Protection and Indemnity insurance) *were available, shows increasings signs of economic obsolesence.*" (Italics ours.)

Professor Lambert in 24 N. A. C. C. A. Law Journal (Nov. 1959) commented at page 225:

"An act which is vicious in its impact, unconscionable in its results, and outmoded in an age of institutionalized protective insurance, if it cannot be repealed outright, deserves only a narrow, grading and copstrictive constriction. A law which is hostile to the current ends of the legal order merits only inhospitable interpretation * * *."

The supposed justification for the limitation of liability statute is to encourage investment in shipping. In the earlier days of steam and sail, shipping was more hazardous and often many individuals would invest in a single vessel or in the profits of a single voyage that would take many months to complete. *Cf. Brown* v. *Hicks*, 8 Fed. R. 155 (D. C. Mass. 1881); *In the Matter of the Schooner Eliza B. Emory*, 3 Fed. R. 241 (D. C. N. J. 1880). Although some individual and joint ownership still exists, the bulk of shipping is in the hands of various corporate organizations who operate anything from a few tramp steamers to large complex fleets. *Gilmore & Black, The Law of Admiralty* (1957) §1-5.

The policy, as well as the letter of the law is a guide to application of the law to different circumstances which may arise. A statute should be interpreted to avoid harsh, unjust, arbitrary, and unreasonable results. *Cox* v. *Roth*, 348 U. S. 207, 75 S. Ct. 242, 99 L. Ed. 260 (1955); *Markham* v. *Cabell*, 326 U. S. 404, 66 S. Ct. 193, 90 L. Ed. 165 (1945); *Delany* v. *Moraitis*, 136 F. 2d 129 (4 Cir. 1943).

That the results in this case are harsh, unjust, arbitrary and unreasonable is obvious. The plaintiff is not a seaman "signed up" for a single voyage on a single vessel in the more usual sense. He is one of many on a "master list" of seamen used by the defendant in its centrally controlled operations in New York Harbor. What policy is served by limiting his recovery to the value of a particular tug or barge he was working on or with at the time of the acci-

dent? Is it merely to provide a windfall for the corporate defendant or its insurer? This was not the original intent of the statute. Was it the policy of Congress to encourage the railroad to continue to use its obsolete equipment? We do not think so.

The Limited Liability Act was first enacted in 1851. Since that time the United States endured the Civil War, the Spanish-American War and two World Wars. The country changed its economy from a relatively simple one based on agriculture, simple manufacture, trade and shipping to the great economic complex of today involving the widespread use of the corporate device and insurance to limit and avoid certain risks to business enterprise. The attitude on industry's responsibilities toward workingmen changed at the turn of the century and workmen's compensation acts began to make their appearance in our laws. 1 *Larson's Workmen's Compensation Law* (1952) Sec. 5.20. The Federal Employer's Liability Act, 45 U. S. C. §51 *et seq.*, and later the Merchant Marine Act, 46 U. S. C. 688, subsequently appeared. This Court has noted the changes which have occurred. In *Cox* v. *Roth*, 348 U. S. 207, 75 S. Ct. 242, 99 L. Ed. 260 (1955) this Court held that recovery under the Jones Act was not defeated by the death of the tort feasor. Among other things, Mr. Justice CLARK commented at page 244:

> "* * *. Nevertheless, in considering the harshness of the rule sought to be imposed under the Jones Act, we do note that *advancing civilization and social progress* have brought 43 of our States to include in their general law the principle of the survival of causes of action against deceased tortfeasors, * * *." (Italics ours.)

See also the comments of Mr. Justice BRENNAN in *Kermarec* v. *American Dredging Company*, 355 U. S. 426, 431, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958).

In their text *The Law of Admiralty*, Professors Gilmore and Black review the history of the Limitation statute in Chapter X. Among other things the authors commented at page 666:

"§10-3. The formative period for limitation law was the last quarter of the 19th Century. It may be that counsel for the shipowners, in making no use of the Act between 1850 and 1870, were wise in their generation and that their clients reaped an unexpectedly rich harvest in the benign climate of the latter part of the century when the sun shone on invested capital as it has done in no other period of our history. *The results were astonishingly favorable to the shipowners, and the statute, as expounded by the Supreme Court and supplemented by the industry of Congress, was expanded almost beyond belief.* The purpose of the 1851 Act had been to put American shipowning interests on a competitive equality with British interests, so far as limitation of liability was concerned. English limitation law, it might have been supposed, was the obvious analogy to which our courts would look in developing our limitation law. However, the Supreme Court almost from the beginning cut American law loose from English influence by elaborating the theory that the 1851 Act had reincorporated in our law the theory of limitation as found in the 'general maritime law'; thus in case of need our statute could be supplemented by general principles or particular doctrines derived from that vague corpus, from the Code of Oleron on down. By the application of its 'general maritime law' theory, which reserved a wide field for judicial manoeuvre, the Supreme Court had erected by 1900 or thereabouts a structure of limitation law which gave shipowners much more protection than the British counterpart. Not only did the case by case holdings almost uniformly grant limitation, but the early opin-

ions furnish a treasure-house of quotable passages—still regularly quoted in the briefs of counsel—on the proposition that the Limitation Act must be liberally construed so as to effectuate its beneficient purposes.

§10-4. Since approximately 1930 the early enthusiasm, both legislative and judicial, for the limitation principle has cooled. * * *." (Italics ours.)

While admitting the power of Congress to legislate with reference to maritime matters, the plaintiff contends that Congress must do so in a manner which is not arbitrary and capricious and which does not deny the plaintiff the equal protection of the laws and does not deprive him of property without due process of law.

The plaintiff had a right to recover for the full extent of his injuries, a right which was translated into monetary value by the verdict of the jury in this case. He enjoyed this right in common with a multitude of fellow employees. He served on various vessels with other employees which vessels were constantly engaged in pushing, pulling, and hauling various barges and other vessels from point to point in the Hudson River. The effect of the decision below is to make the recovery dependent on a kind of maritime Russian Roulette unrelated to the encouragement of investment in shipping. It is difficult to understand why one employee should be compelled to make an involuntary contribution to his employer, while a fellow employee is to obtain full indemnity. Congress did not intend to encourage shipowners to use obsolete and worthless equipment. Furthermore the statute as applied in this situation is arbitrary and capricious, is unequal and unfair in application, and deprives the plaintiff of his property without due process of law.

The fractionalizing of the defendant's equipment for the purpose of limitation of liability is also unreasonable and arbitrary. The defendant does not regard its tug opera-

tions in the harbor as single "ventures" in the traditional historical sense which gave rise to the concept of limitation of liability. Rather its centrally controlled operations are continuous in moving freight back and forth in a relatively small area. To limit recovery to the value of a piece of equipment to which a crew member may be assigned, at the time he is injured, especially where the equipment itself may not be the cause of the injury or where the equipment is obsolete and is being used temporarily to replace new equipment is capricious and arbitrary.

In short, whatever may have been the original motive for limitation of liability, in a modern setting it lacks that rational nexus which is required by the Constitution to justify the type of discrimination which will produce such diverse results in recovery among seamen working for the same master. Cf. *Morey* v. *Doud*, 254 U. S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957); *Bolling* v. *Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954) sup. opin. 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955); *Smith* v. *Cahoon*, 283 U. S. 553, 566, 51 S. Ct. 582, 75 L. Ed. 461 (1931).

CONCLUSION

The limitation of liability statute cannot be interpreted as an abstract concept. It is the duty of the courts to interpret this statute in a way consistent with the intent of Congress which intent includes a presumed desire not to produce any unnecessary harsh, unjust, arbitrary, capricious, or discriminatory results.

In the present case the plaintiff is a seaman employed by a railroad. He received personal injuries and was damaged thereby. A jury fixed his damages at $75,000.00 and found that his employer was negligent. It is the stated policy of the Jones Act that the plaintiff was entitled to a jury trial on the issues of damages and a jury verdict. There is nothing in the limitation of liability statute which requires a denial of this policy.

The court below erred in refusing to grant full effect to the general verdict of the jury and in making a new, independent and very narrow finding as to negligence and proximate cause. The defendant failed to prove that it had no "knowledge or privity" concerning every issue of negligence submitted to the jury. It was undisputed that it did have "knowledge and privity" concerning the improper and unsafe maneuver used at the time of the accident. The motion for limitation should have been denied because this was one of the issues submitted to and passed upon by the jury.

The motion should have been denied also on the ground that the remedy afforded by the limitation statute could not be granted by the court. The defendant never filed a petition in admiralty. The action which was based on diversity of citizenship as well as the Jones Act was on the civil side of the court. Congress knew at the time of the 1936 amendment that in order to obtain a remedy in the admiralty court it was necessary to file a petition in the admiralty court. Congress intended to limit the right of the shipowner to apply for his special privilege and it did so specifically. If it had intended to make any exception concerning the time to file a petition, it could have stated the exception without difficulty. It did not and the courts should not extend the special privilege beyond the plain meaning of the statute.

The court erred in limiting valuation to the tug and the barge actually involved in the collision. The defendant's activities do not fall within the traditional "voyage" concept of ocean-going vessels. The tug was a service vessel, directed from a central point in New York Harbor and it worked back and forth in the harbor as part of defendant's common carrier work in New York Harbor. The defendant's entire harbor fleet was part of its operating venture. In connection with "freight pending," the nature of defendant's activities was also pertinent. The defendant's

operations were continuous. The plaintiff's employment was continuous. Obviously the services of the defendant's tug and barge, as well as plaintiff's services had some value to defendant. The failure of the defendant to offer its "freight pending" and the refusal of the court to require the defendant to offer "freight pending" was error.

The defendant temporarily replaced a new efficient tug to which the plaintiff was regularly assigned with a tug which was old, inefficient and ready for retirement. At the very least the new tug to which plaintiff was regularly assigned should have been included in the valuation proceeding.

The court erred in refusing to submit the issue of unseaworthiness to the jury. There was evidence from which it could have been determined that the defendant's tug was unseaworthy. The defendant had "knowledge and privity" of the unseaworthy condition of the tug.

The interpretation of the statute applied by the court below was arbitrary and capricious and violated the due process and equal protection clause of the United States Constitution. The limitation statute should be narrowly construed and should be construed to avoid harsh and unjust results.

Wherefore the petitioner prays that his petition of a writ of certiorari be granted.

April 17, 1961.

Respectfully submitted,

NATHAN BAKER,
Counsel for Petitioner.

BERNARD CHAZEN,
MILTON GARBER,
On the Brief.

[APPENDIX FOLLOWS]

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 130—October Term, 1960.

(Argued January 3, 1961 Decided February 20, 1961.)

Docket No. 26125

CHRISTOPHER MURRAY,

Plaintiff-Appellant,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant-Appellee.

Before:

LUMBARD, Chief Judge, and
SWAN and WATERMAN, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Murphy, Judge, in an action wherein plaintiff's claim under the Jones Act, 46 U. S. C. A. §688, was tried to a jury, whose verdict was reduced by the judge, pursuant to defendant's plea of limitation of liability, to the value of the barge and tug involved in the accident that caused plaintiff's injuries. Affirmed.

BERNARD CHAZEN, of Baker, Garber & Chazen, Hoboken, New Jersey (Nathan Baker, of counsel and Milton Garber, on the brief) for plaintiff-appellant.

J. H. SHAPIRO, GERALD E. DWYER, New York City (C. Austin White and J. H. McDonald, of counsel) for defendant-appellee.

SWAN, Circuit Judge:

On April 26, 1955, the plaintiff sustained injuries when defendant's barge on which he was employed as floatman, or deckhand, was being moved by defendant's tug No. 20 from one slip to another in Weehawken, New Jersey. In the course of executing the maneuver which is commonly called "off the corner," the barge and tug came together so violently as to throw plaintiff into the Hudson River. Alleging that he was a resident of New Jersey and that defendant was a New York corporation, he brought suit in the court below on the civil side, and claimed a jury trial. His complaint alleged three causes of action, one under the Jones Act, a second based on allegations that the tug and barge were unseaworthy, and, third, a claim for cure and maintenance triable only in admiralty. See *Bartholomew* v. *Universe Tankships, Inc.*, 2 Cir., 279 F. 2d 911. Besides denying negligence and unseaworthiness, defendant pleaded as a partial defense to the Jones Act claim limitation of liability pursuant to 46 U. S. C. A. §183(a).

The case was tried in January 1959. On defendant's motion the judge dismissed the second cause of action on the ground that there was no evidence touching the issue of unseaworthiness. The first cause of action based on the Jones Act was submitted to the jury under a charge to

which no exception was taken. The jury returned a verdict of $75,000. On March 6, 1959, Judge Murphy having filed an opinion granting limitation and awarding maintenance, a partial judgment was entered in the sum of $2,800 for maintenance. Since the judge had sustained the defense of limitation of liability, he thereafter appointed a commissioner to take evidence and report as to the value of the two vessels involved. The commissioner found the value of tug No. 20 to be $10,000 and the value of the barge $6,000. His report was confirmed by the court and final judgment was entered November 23, 1959. The plaintiff duly appealed.[*]

The appeal raises no question as to the correctness of the award for maintenance. It does question dismissal of the cause of action based on allegations of unseaworthiness; but to this it will suffice to say that the decision is so clearly right as to deserve no discussion. The remaining issues involve the application of the Limitation of Liability Act to a personal injury action at law under the Jones Act, and the valuation of the two vessels involved.

A rational policy of long standing lies behind the Limitation Act, though it may be, as appellant has argued at great length, that the policy has become obsolete. But Congress has not repealed the Act, and there is certainly no sound basis for this court to strike it down as a denial of equal protection of the laws.

The appellant contends next that defendant's plea of limitation of liability was filed too late. The Railroad was notified of plaintiff's claim by a letter mailed on August 8, 1956, and did not file its plea until more than six months thereafter. Since the statute allows only six months for filing a petition for limitation of liability, 46 U. S. C. A.

[*] The defendant filed a cross-appeal, but this need not be considered in view of our disposition of the plaintiff's appeal.

§185, appellant claims that a plea can be filed no later. The fallacy of such a contention was pointed out long ago by Judge Goodrich in *The Chickie*, 3 Cir., 141 F. 2d 80. This circuit adopted the rule of *The Chickie* in *Deep Sea Tankers, Ltd.* v. *The Long Branch*, 2 Cir., 258 F. 2d 757. There is sound reason to differentiate between an original petition for limitation and a plea setting up §183(a) of the statute in defense to a civil suit, since the plaintiff controls the date of bringing his suit. In the case at bar the complaint was filed on February 5, 1957, but was not served until February 8. The defendant's answer was served on February 26. The rule for which appellant contends disregards the desirability of one trial only, where all rights can be fairly decided in a single legal proceeding. See *Moore-McCormack Lines* v. *McMahan*, 2 Cir., 235 F. 2d 142, at 143; *British Transport Comm.* v. *U. S.*, 354 U. S. 129 at 133. Thus, in the case at bar, under appellant's rule, the Railroad could not safely wait to see whether the plaintiff would actually bring an action on the claim of which he had given notice, and there would be two suits pending in the District Court, in each of which the facts to be proved as to the accident producing plaintiff's injuries would be the same.

The appellant's attempt to distinguish the rule of *The Chickie* because that was a suit in admiralty is wholly unconvincing. If limitation may be pleaded as a defense beyond the six month period, it would be unreasonable to make its availability turn on whether a plaintiff elects to bring suit on the admiralty side or the civil side of the court. Moreover, the plaintiff did invoke admiralty jurisdiction in suing for maintenance, and Judge Murphy as an admiralty judge determined the right to limitation of liability.

With respect to the Jones Act claim the jury was instructed in a clear and unexceptionable charge that they

might find the defendant guilty of negligence if the tug and barge were brought into contact with such force as to cause the plaintiff to be thrown into the river. The plaintiff had testified that this was exactly what happened. Capt. Eisenhower, called by plaintiff as an expert witness, who had himself often used the "off the corner method," testified that there was another method of shifting a barge, and if the shifting were done in that manner, there would be little or no contact between the barge and the tub. The charge allowed the jury to determine whether the defendant was negligent in not using the other method. The court also gave an appropriate charge on the issue of proximate cause. On the first theory of negligence, the excessive violence of the contact between tug and barge was a fault of navigation, which would not preclude limitation of liability. The second theory of negligence, if found to be the proximate cause of plaintiff's injuries, would preclude limitation, since it was conceded that the Supervisor of the defendant's marine operations knew that the tug boat captains did use the "off the corner" maneuver. As the jury returned a general verdict, it is argued that it is impossible to say which theory of negligence they accepted, and consequently limitation of liability must be denied.

In passing on the limitation issue, Judge Murphy found that the injury was caused by the excessively severe contact between tug and tow. This finding was in no way inconsistent with the jury's general verdict.

The division of functions between judge and jury in such a case is analogous to the situation presented in *Langes* v. *Green*, 282 U. S. 531 and *Ex Parte Green*, 286 U. S. 437. See *The Quarrington Court*, 2 Cir., 102 F. 2d 916, 918; see also *Petition of Red Star Barge Line*, 2 Cir., 160 F. 2d 436, 438; *George J. Waldie Towing Co.* v. *Ricca*, 2 Cir., 227 F. 2d 900, 901. In these cases, it is true, the civil action was brought in a state court rather than a

federal district court and the shipowner filed a petition for limitation rather than a plea in the civil action. But these differences do not in our opinion make the cases inapplicable.

The appellant next contends that the court erred in limiting recovery to the value of tug No. 20 and the barge Jones Point. He argues that the court should have required the limitation to include:

1. "The value of Tug 32 on which Mr. Murray was regularly employed and for which tug 20 was a temporary substitute, as 32 was laid up for repairs on April 26, 1956."

2. "The value of the entire maritime unit of the defendant employed by it in its maritime operations in New York Harbor."

3. "The value of all defendant's tug boats and barges served by the 'master crew list' and 'Rosters' upon which plaintiff's name was carried a seaman."

4. "The value of, at least, the barges in the area of the Pier where defendant's tug was 'shifting barges' or the vessels of the defendant which would be involved in the continuous activities of Tug 20 during its 8 hour tour with its crew."

No authority is adduced to support any of these extraordinary contentions, except *In re United States Dredging Corporation*, 2 Cir., 264 F. 2d 339, cert. denied 360 U. S. 932. There six vessels had to be surrendered but the situation in that case bears no resemblance to the case at bar. We hold that only the tug and barge involved in the accident were required to be surrendered, and that the valuation of each of them, as found by the commissioner, is adequately supported by the record. Accordingly the judgment is affirmed.

Statutes Involved

46 U. S. C. A. §183 provides:

"(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less then $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section, the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term 'seagoing vessel' shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lights, non-descript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R.S. §4283; Aug. 29, 1935, c. 804, §1, 49 Stat. 960; June 5, 1936, c. 521, §1, 49 Stat. 1479."

46 U. S. C. A. §185 provides:

"The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition

such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R.S. §4285; June 5, 1936, c. 521, §3, 49 Stat. 1480."

FILED

Supreme Court of the United States

OCTOBER TERM, 1960

No. 929

CHRISTOPHER MORGAN,

Petitioner,

against

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERARD E. DWYER

Attorney for Respondent

OFFICE & P. O. Address

120 East 41st Street

New York 17, N. Y.

INDEX

PAGE

Statement of Facts as Developed in the Courts Below. (Supplementing Petitioner's Statement) 1

1. The Evidence Presented as to the Claim of Unseaworthiness 1

2. Plaintiff's Position on the Motion for Limitation 2

3. The Issues Submitted to the Jury 3

4. The Court's Basis of Decision on Limitation 4

Argument:

POINT I—Limitation as a defense was timely pleaded. (Answering Petitioner's Point IV) 5

POINT II—There was no question for the jury on the unseaworthiness Count. (Answering Petitioner's Point II) 10

POINT III—There was no error in submission of issues to the jury. (Answering Petitioner's Point V) 11

POINT IV—The jury decided and could have decided no question relevant to decision on limitation of liability. The Trial Court properly held that only the manner of execution of a customary maneuver was the cause of the accident. (Answering Plaintiff's Point I) 13

PAGE

POINT V—The Trial Court committed no error in limiting recovery to the value of the vessels involved in the accident. (Answering Petitioner's Point III) 16

POINT VI—No constitutional right of plaintiff has been violated. (Answering Appellant's Point VII) 19

Conclusion 21

TABLE OF CASES CITED

Chickie, The, 141 F.2d 80; 3 Cir. 1944 ..... 5, 8

Christian v. *Boston & Maine R.R.*, (2d Cir. 1940), 109 F.2d 103 14

Deep Sea Tankers v. *The Long Branch*, 258 F.2d 757; 2 Cir. 1958, cert. den. 358 U.S. 933 ..5, 6, 7, 8.

East River Towing Co., In re, 266 U.S. 355 20

Erie R.R. v. *Gallagher* (2d C.A.), 255 Fed. 814 .. 14

Garret v. *McCormack Co.*, 317 U.S. 239 9

George W. Pratt, The, 76 F.2d 902 (2d C.A. 1935) 18

Imperial Oil Limited v. *Drlik*, 234 F.2d 4 (6 C.A. 1954) c. d. 352 U.S. 941 15

Lake Tankers Corp. v. *Henn*, 354 U.S. 147 ..... 5, 6

Lehigh Valley v. *Normile* (2d C.A.), 254 Fed. 680 14

Langnes v. *Green*, 282 U.S. 531 9

Mahnich v. *Southern Steamship Company*, 321 U.S. 96 10

Mitchell v. *Trawler Racer*, 362 U.S. 539 ..... 9, 10

PAGE

Panama R. R. ... v. Johnson, 264 U.S. 375 (1924) 20

Sacramento Nav. Co. v. *Salz*, 273 U.S. 326 (1927) 18

Wilmington Star Mining Co. v. *Fulton*, 205 U.S. 60 (1907) 14

OTHER AUTHORITIES CITED

28 U.S.C. 1873 12

46 U.S.C. 688 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 929

CHRISTOPHER MURRAY,

Petitioner,

—against—

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement of Facts as Developed in the Courts Below.

(Supplementing Petitioner's Statement)

1.

The Evidence Presented as to the Claim of Unseaworthiness.

In plaintiff's opening to the jury it appears that his claim of unseaworthiness of the tug and barge was, in principal part, based on the asserted absence of a "life line" on the barge (2b).* On the stand plaintiff himself admitted this played no part in the

---

* "b" references to pages in Appellee's Appendix in the Court of Appeals; "a" references to pages in Appellant's Appendix in the Court of Appeals.

accident; when the contact threw him from the barge he was actually holding on to a cable or "life line" (6, 7b).

No witness testified Tug 20 was inadequate for the purpose of shifting barges or attributed the accident to any defect in the Tug. Plaintiff's expert specifically stated the tug could be used to shift barges (9b). The Court, in the charge which was not excepted to, summarized the evidence:

> "Other than the fact that it was older and it was shorter and less powerful than the regular tugs, (445) there was no testimony, as I recall it, that in any way associated the efficacy of the tug with the accident." (109a)

2.

Plaintiff's Position on the Motion for Limitation.

Plaintiff, at the close of the evidence, moved to take the case from the jury except for assessment of damages (103a). That motion was denied and the Court asked for agreement on dates relevant to the limitation issue. These were forthcoming (104a). The formal motion for limitation being then made, the Court asked for agreement that he might reserve on "that legal question" until after verdict, if any (105a).

> "Mr. Baker: I would submit to your Honor that under the question of the answer being filed setting forth that they have a right to limitation of liability, that the legal question should be reserved by the Court, but I submit to your Honor that the factual question as to whether or not

there was privity knowledge [sic] should or can be submitted to the jury for determination, and then the Court, after the decision of the jury, depending upon what the verdict is, takes up for consideration the legal (418) questions involved." (105a)

The Court obtained a concession on the factual point (106a) restated that he reserved the questions and proceeded to charge the jury without any objection or exception (113a).

3.

The Issues Submitted to the Jury.

The Court commented:

"It is the plaintiff's claim that his injuries were sustained as a result of the manner in which the tug and barge came together during a shifting operation in the waters of the Hudson River alongside of Pier 4 in Weehawken. It is his claim that the defendant was negligent because the force of contact between these two boats were so great that he was caused to be thrown from the barge into the river." (107a)

Plaintiff's expert's testimony that the "center cleat" rather than "off the corner" type of maneuver would make for less contact between barge and tug was referred to, as was both plaintiff's and his expert's testimony that they had on many occasions used both methods and defendant's witnesses' testimony that they knew both methods (108a). The jury was told that the latest or safest method was not required

(110a). The conflict in testimony as to whether the contact between tug and barge was or was not heavy was referred to (108a-109a).

Then the question:

"Of course, you know the defendant is not an insurer of plaintiff's safety. On the other hand, those people who employ seamen, ship owners, railroads, are required to fulfill a much higher degree of care than shoreside employers. One of the obligations that a ship owner has is that he provide a safe place for the seamen to work. Therefore, your ultimate question on the issue of defendant's negligence is did the defendant and its employees under the circumstances and at the time here disclosed fail to act as reasonable men or a reasonable ship owner would have acted in connection with the shifting of this barge." (110a)

4.

The Court's Basis of Decision on Limitation.

"The accident which caused plaintiff to be thrown into the water and injured was not the 'off the corner' movement but rather the negligent manner in which it was performed and which caused the tug and the barge to come together too violently. In short, the proximate cause of the accident was not the customary maneuver but the negligent manner in which the two vessels came together and this was nothing more than a mistake in navigational judgment on the part of the captain and for which the owners cannot be held to have knowledge or privity." (117a)

ARGUMENT

POINT I

Limitation as a defense was timely pleaded.
(Answering Petitioner's Point IV)

1.

The only two Courts of Appeal, the Second and Third Circuits, that were squarely presented with the issue prior to this case both held that, where there is but a single claimant, limitation of liability may be pleaded as a defense in the sole action and that the six months period during which petitions for limitation of liability may be filed against all claimants and injunctive relief secured thereon has no application. *Deep Sea Tankers* v. *The Long Branch*, 258 F.2d 757; 2 Cir. 1958, cert. den. 358 U.S. 933 following *The Chickie* 141 F.2d 80; 3 Cir. 1944.

2.

Any other holding would be in the teeth of the teaching of this Court culminating in *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147 as to the disparate nature of the substantive and procedural sections of the limitation statute and the history of statute and construction.

In *Lake Tankers* (354 U.S. at 150), for the majority, Mr. Justice Clark held that the purpose of the statutory scheme was to afford protection from disasters

and that procedure should be adapted to that goal. He said (354 U.S. 150, 151):

> "The first section of the Act here involved contains its fundamental provision which declares that the liability for any damage arising from a disaster at sea which is occasioned without the privity or knowledge of the shipowner shall in no case exceed the value of the vessel at fault together with her pending freight, 46 U. S. C. §183. As Mr. Justice Van Devanter stated for a unanimous Court in *White* v. *Island Transportation Co.*, 233 U. S. 346, 351 (1914), 'The succeeding sections are in the nature of an appendix and relate to the proceedings by which the first is to be made effective. Therefore, they should be so construed as to bring them into correspondence with it.' Among these sections dealing with the mechanics of effecting such limitation of liability is §184 covering those incidents where 'the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of [the claimants].' In that event, the section continued, 'they shall receive compensation from the owner of the vessel in proportion to their respective losses; and *for that purpose*' the owners 'may take the appropriate proceedings in any court * * *'. (Emphasis added)"

In *Deep Sea Tankers* (258 F.2d at 772-773), Medina C.J. set forth the history:

> "The first statute authorizing the limitation of liability, the forerunner of Section 183, was enacted in 1851, 9 Stat. 635. In 1872 the Supreme Court promulgated admiralty rules of procedure which permitted a shipowner to petition for limita-

tion of liability. Shortly thereafter the Congress enacted the substance of these rules into law. In commenting on the purpose of the rules, the Supreme Court said they 'were adopted for the purpose of formulating a proceeding that would give full protection to the shipowners in * * * a case' where there were 'various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo.' 'They were not intended to prevent them from availing themselves of any other remedy of process which the law itself might entitle them to adopt. They were not intended to prevent a defence by way of answer to a libel, or plea to an action, if the shipowners should deem such a mode of pleading adequate to their protection.' The Scotland, 105 U. S. 24, 33-34, 26 L. Ed. 1001. It is unnecessary to comment on the variety of situations that may arise, in some of which concursus is highly desirable if not indispensable and in others not.

In practice it developed that the proceeding by way of petition for limitation of liability was often a source of delay and circuity of action, because shipowners did not institute this independent proceeding until after the question of liability had been litigated and determined against them. To alleviate the abuses inherent in this situation, the Congress, on June 5, 1936, amended Section 185 to require that a petition for limitation must be filed within six months of notice of claim.

Section 185, as amended, does not refer to Section 183(a), and no reason has been advanced by appellants for making the right to limitation as provided in Section 183(a) subject to the six months time bar. Indeed, the Congress amended both Section 183(a) and Section 185 simultan-

eously in 1936 without specifying any time limit in Section 183(a). Moreover, the abuses which resulted under Section 185 prior to its amendment are not encountered when limitation is pleaded by way of answer, because the libelant, by filing its libel, controls the time within which the remedy must be invoked. Therefore, in accord with The Chickie, supra, we hold that the Metropolitan plea of limitation in its answer was not barred by the six months time limit of 46 U. S. C. A. §185."

3.

The two *Green* and the other cases cited by petitioner at page 31, top, besides having their holding misstated (infra p. 9), have no bearing in this action. There is here no question of the respective powers of state and federal court. The only question here is of procedure in a United States Court, the traditional repository of the power of limitation of liability in admiralty, to deal with a single claim there asserted.

The Chickie and *Deep Sea Tankers* are not distinguishable as brought in admiralty. The Court below said (Pet. 4a):

> "If limitation may be pleaded as a defense beyond the six month period, it would be unreasonable to make its availability turn on whether a plaintiff elects to bring suit on the admiralty side or the civil side of the court."

Further, it was correctly held (Pet. 4a) that plaintiff did invoke the remedy of maintenance and therefore admiralty jurisdiction. Maintenance and cure even if sometimes tried on the civil side, is a remedy whose derivation is almost immemorially in the law of

the sea. *Mitchell* v. *Trawler Racer*, 362 U.S. 539, 543, 544, note 6, *Garret* v. *McCormack Co.*, 317 U.S. 239, 240, note 2.

Application of the substantive law of limitation of liability is not restricted to admiralty courts or even United States courts. In a single claim such as this, it may be applied by even a state court, as petitioner overlooks in his statement of *Langnes* v. *Green*, 282 U.S. 531, at 540.

4.

The rule to be followed should not be based on considerations of civil side versus admiralty side, but on sound principles of judicial administration. It was held below:

> "There is sound reason to differentiate between an original petition for limitation and a plea setting up §183(a) of the statute in defense to a civil suit, since the plaintiff controls the date of bringing his suit. In the case at bar the complaint was filed on February 5, 1957, but was not served until February 8. The defendant's answer was served on February 26. The rule for which appellant contends disregards the desirability of one trial only, where all rights can be fairly decided in a single legal proceeding. See *Moore-McCormack Lines* v. *McMahan*, 2 Cir., 235 F. 2d 142, at 143; *British Transport Comm.* v. *U. S.*, 354 U. S. 129 at 133. Thus, in the case at bar, under appellant's rule, the Railroad could not safely wait to see whether the plaintiff would actually bring an action on the claim of which he had given notice, and there would be two suits pending in the District Court, in each of which the facts to be proved as to the accident producing plaintiff's injuries would be the same." (Pet. 4a)

POINT II

There was no question for the jury on the unseaworthiness count.

(Answering Petitioner's Point II)

Plaintiff chose to try his case with heavy reliance on expert testimony (32a-54a). There was no word, however, from plaintiff, his expert or the rest of the experienced crew of Tug 20 pointing out any connection between the age or sluggishness of the tug and the accident. The Court pointed this out in the charge without objection or exception (supra p. 2).

> "Unseaworthiness in the abstract does not afford a cause of action. An injury must be in consequence of the unseaworthiness—"must be connected with and result from it."
>
> *Mahnich* v. *Southern Steamship Company*, 321 U.S. 96, at 109.

Recently this Court said:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 99 L ed 354 75 S. Ct 382." *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 at 550.

Sufficiency of the evidence to go to the jury alone, particularly when the decision of the trial court may well be based on the complete failure to make the proof outlined in the opening, is not a question of which this Court should take jurisdiction.

POINT III

There was no error in submission of issues to the jury.

(Answering Petitioner's Point V)

1.

Petitioner does not state what evidentiary facts constitute the "factual issue of privity and knowledge" he claims was for the jury. As presented in the trial court any issue so denominated is for neither court nor jury, but a matter of concession without effect on the final result.

There was a full presentation of evidence by both sides at the trial. The time came for decision of the issues. The Trial Judge indicated he would take a jury verdict as to negligence. Defendant moved for limitation of liability. The Trial Judge stated that issue was for him and would be reserved. Plaintiff's failure to object to this exercise of admiralty jurisdiction at this point is spread upon the record. A single request was made—to give the jury the question of "privity (and) knowledge." The Court was not too sure what this meant (105a-106a), but stated that so far as the fact of defendant's consent to use of the "off the corner" movement was concerned that fact

was conceded. There discussion ended. The charge to the jury submitted no issue on which decision of the limitation question could be based. Exceptions were invited. There were none.

The Court therefore had ample reason for stating in his opinion after trial (115a) that his reserving decision on the defendant's motion for limitation of liability as well as the plaintiff's claim for maintenance and cure was "By agreement of counsel * * *".

Having consented to the procedure adopted, leaving decision as to limitation in the Court's hands, not having objected seasonably or, indeed, at all, plaintiff may not now complain that the Court did decide the motion.

2.

Plaintiff has no right by jury to trial of any issue on the applicability of a rule such as limitation of liability traditionally existing only in admiralty. When Congress desires to create a right to jury trial in maritime causes it does so (46 U.S.C. 688, 28 U.S.C. 1873) and extension should be left for legislative action.

3.

Questions of waiver at trial and withdrawals of issues by counsel are procedural minutiae with which this Court should not concern itself.

POINT IV

The jury decided and could have decided no question relevant to decision on limitation of liability. The Trial Court properly held that only the manner of execution of a customary maneuver was the cause of the accident.

(Answering Plaintiff's Point I)

1.

It is not now open to plaintiff to argue that the jury verdict decided anything on any issue bearing on whether a proper method of navigation was not used to the knowledge of defendant and that limitation of liability is accordingly not available to defendant. The charge was stated to be limited to "Jones Act negligence and the question of apportionment of negligence" (106a). Plaintiff failed to except (113a) if he had not already specifically consented to the reservation of the limitation question by the Trial Court.

2.

If the question of whether the use of the "off the corner" method as negligence was directed to limitation of liability, rather than constituting merely one facet of Jones Act negligence, summed up in the obligation to provide a safe place to work (supra pp. 3, 4), there is no way of telling whether the jury decided this question adversely to defendant. Where two theories are submitted to a jury, a general verdict

does not show upon which ground the jury found. Indeed, where one theory is not supported by the evidence, the verdict cannot stand. *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60, 78-79 (1907); *Christian* v. *Boston & Maine R.R.*, (2d Cir. 1940), 109 F. 2d 103; *Erie R.R.* v. *Gallagher* (2d C.A.), 255 Fed. 814, 817; *Lehigh Valley* v. *Normile* (2d C.A.), 254 Fed. 680, 682.

In *Christian*, 109 F. 2d at 105, the Court below said:

> "The error requires reversal of the judgment. The verdict for the plaintiff was a general one. For all we know, the jury found its verdict on the claim for which there was no evidence. Where two issues of negligence are sent to the jury and the verdict for the plaintiff is general, the judgment must be reversed if there was no evidence in support of one of the issues."

Previously, in *Gallagher*, 255 F. 2d, at 817, the same Court reversed a judgment for the same reason, saying:

> "The reason is that the appellate court cannot know but that the jury may have found its verdict upon the baseless charge."

The Court below saw no inconsistency between the jury verdict and the Court's ruling that the method of navigation had no causal relation to the injury. (Pet. 5a).

3.

The Trial Court Was Not Plainly Wrong in Holding That Only the Manner of Execution of the Maneuver Was the Cause of the Accident.

The barge had to be towed out of the slip. There is testimony that one possible method of doing so involved less likelihood of contact between barge and tug than the other. The method adopted, however, is one customarily used. No one testified that this method was inherently dangerous or likely to cause hard contact in an undue proportion of instances. Only a single instance of injury caused thereby was referred to and that when performed by plaintiff's expert (50a) who recognized that how hard the contact would be depended on how the tug was handled during the maneuver (49a).

The proof comes down to this, at best—tugs strike barges in the off the corner maneuver, but how hard is dependent on how the tug is handled. The variations in the maneuver and not the maneuver itself are responsible for a hard contact and consequent injury. The occasional use of the maneuver was with the privity and knowledge of the owner, the manner in which it was executed was entrusted to the judgment of a concededly competent master in a seaworthy vessel.

Imperial Oil Limited v. *Drlik*, 234 F. 2d 4 (6 C.A. 1954) c. d. 352 U. S. 941, is a parallel case. Unseaworthiness was claimed because no watchman was present at the operation in which plaintiff was injured. A watchman was available, but was not sta-

tioned where he should have been. This was held to be negligence only—the faulty judgment of the person in charge—and a finding of unseaworthiness was reversed. The final cause and not a more remote one controls.

POINT V

The Trial Court committed no error in limiting recovery to the value of the vessels involved in the accident.

(Answering Petitioner's Point III)

1.

The last event at the trial after the verdict and motions was the following between the Court, plaintiff's counsel and defendant's counsel:

> "The Court: * * * I will direct the clerk not to enter judgment until I decide the issue of limitation.
>
> All right, Gentlemen, thank you.
>
> On the issue of limitation there is a dispute as to the issue of value.
>
> Mr. Baker: Yes.
>
> The Court: With regard to that question we have to take testimony.
>
> Mr. White: Presumably only on the tug.
>
> Mr. Baker: On both, the tug and the barge, if we reach that question." (114a)

Plaintiff has been awarded the value of both the tug and the barge, all that he asked at the trial.

2.

The record is barren of any description of the operation in which plaintiff was injured except that the tug was going to "shift barges in the Weehawken terminal". There is no evidence whatever that any barge except the "Jones Point" or any other tug than No. 20 was involved. The operation as to which we have evidence involved only these two vessels and their value has been awarded plaintiff.

Plaintiff has progressed in not so easy stages from one tug and the one barge it was shifting, to all the barges the tug might shift with one crew, to all the tugs and all the barges the crew might work on in an unspecified time; to all the tugs and all the barges and all defendant's equipment in the harbor, to all the railroad. It is not clear where he would stop nor is there any logical stopping place—after the first, which the court enforced. Plaintiff would not leave defendant much solace in the limitation procedure which is still on the statute books. Possibly limitation is not in accord with the spirit of the age, possibly it should not be extended, but it must be allowed. The remedy must be allowed to some degree where it refers to something definite and readily ascertainable and not a standard of only "the facts of economic life", (Pet. 25) as to which parties may reasonably differ. The Court below applies a proper standard of definite time, definite place and limited operation. In *United States Dredging* (Pet. 22) a single operation limited as to time and place—dredging and gravel removal in Huntington Harbor—was involved. There was no reference to or liability

by reason of other operations of petitioner or any continuous service rendered by it not involved in a specific definite contract. Here we have no proof of any specific contract.

The decision below is entirely in accord with *Sacramento Nav. Co.* v. *Salz*, 273 U.S. 326 (1927) (Pet. 21). That case required surrender of the "combined means"—the tug and the barge it towed at the time of the accident. Precisely this was awarded plaintiff here.

The proper rule was indicated in *The George W. Pratt*, 76 F.2d 902, at 903 (2d C.A. 1935), where the Court stated:

> "Neither the actual decision nor the language of the Kristiansen case can be given so broad a scope as to mean that all the vessels used successively in performing a contract are to be deemed collectively one vessel for purposes of surrender in limitation of liability: *On the contrary*, we think the rule is established that the vessels to be surrendered are those devoted to performance of the contract of the particular time when the fault which causes the loss is committed." (Emphasis supplied)

No case, of course, makes the standard involved that of a contract of employment as petitioner would have it (Pet. 21-22). Each authority he recites relates the vessels involved to the contract the vessels are to perform, not their crew's contract with their employers.

Plaintiff asserts (Pet. 27) that the activities of the vessels here involved are not a voyage in the tradi-

tional sense—and therefore would measure liability by at least all the marine activities of the defendant. These activities are varied and continuous. They have no beginning and no end that can be certainly found. The cases cover situations that do have a fixed beginning and a fixed end—like the dredging in *United States Dredging Corporation*. Here there is none that can be fixed except the single operation of shifting from one pier to another.

3.

This point involves only well settled rules, not contested below. There was and is no issue except the application of such rules, to particular, very special facts.

POINT VI

No constitutional right of plaintiff has been violated.

(Answering Appellant's Point VII)

1.

The Trial Court pointed out that plaintiff was too late in asserting the alleged constitutional issue for the first time after trial and after decision on limitation (120a, 122a). We are given no excuse now for this delay.

2.

Limitation is a part, hoary with age and accumulated tradition, of the system of federal regulation of

matters maritime. This system the Congress may constitutionally add to or alter as it did with the Jones Act on which plaintiff sues, *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 378 (1924) and which statute has been held not to be in conflict with limitation of liability in *In re East River Towing Co.*, 266 U. S. 355. Another part of the system is the seaman's right to maintenance and cure which he has secured in this case.

Plaintiff (Pet. 44) calls this system "Russian Roulette". The same criticism must apply equally to any system which replaces a jury verdict with some other method of indemnity. Workman's Compensation laws restrict the recovery against an employee to a greatly reduced scale. The railroad land employee has greater rights against his employer under the Employers Liability Act than against another railroad where he might be a passenger or licensee. The Constitution requires only some reasonable classification and this is present—the employee relationship. The maritime employee may have his recovery reduced or extinguished through limitation; he has it increased or extended through maintenance and cure. There is an entire system with advantages and disadvantages, enacted in response to differing legislative considerations. Plaintiff is quite willing to accept those parts of the system which gives him a right and a remedy unknown in other systems—maintenance and cure—and relaxed requirements to establish liability—the Jones Act. He has in this litigation taken advantage of both of these advantageous features of the system. He cannot have these and claim the whole system unreasonable and arbitrary because one part—limitation—is to his disadvantage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.,
May 7, 1961.

Respectfully submitted,

GERALD E. DWYER
Attorney for Respondent
Office & P. O. Address:
466 Lexington Avenue
Borough of Manhattan
City of New York (17)